



BellSouth Telecommunications, Inc.

333 Commerce Street
Suite 2101
Nashville, TN 37201-3300

joelle.phillips@bellsouth.com

May 29, 2002

Joelle J. Phillips
Attorney

615 214 6311
Fax 615 214 7406

REC'D
REGULATOR

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OFFICE OF
EXECUTIVE SE

VIA HAND DELIVERY

David Waddell, Executive Secretary
Tennessee Regulatory Authority
460 James Robertson Parkway
Nashville, TN 37238

Re: *Complaint of XO Tennessee, Inc. Against BellSouth Telecommunications, Inc.*

Complaint of Access Integrated Networks, Inc. Against BellSouth Telecommunications, Inc.

Docket No. 01-00868

Dear Mr. Waddell:

Enclosed are the original and thirteen copies of BellSouth's Petition for Appeal from Initial Order of Hearing Officer. Copies of the enclosed are being provided to counsel of record.

Very truly yours,

Joelle Phillips

JP:ch

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5/30/02

**BEFORE THE TENNESSEE REGULATORY AUTHORITY
Nashville, Tennessee**

**In Re: *Complaint of XO Tennessee, Inc. Against BellSouth
Telecommunications, Inc.***

***Complaint of Access Integrated Networks, Inc. Against BellSouth
Telecommunications, Inc.***

Docket No. 01-00868

**BELLSOUTH TELECOMMUNICATIONS, INC.'S PETITION FOR APPEAL
FROM INITIAL ORDER OF HEARING OFFICER**

Pursuant to Tenn. Code Ann. § 4-5-315, BellSouth Telecommunications, Inc. ("BST") submits its Petition for Appeal of the Initial Order of the Hearing Officer entered in the above-referenced docket on April 16, 2002.

ISSUES PRESENTED FOR REVIEW

From March 1999 until April 16, 2002, BST participated in a customer loyalty program operated by BST's affiliate BellSouth Select, Inc., ("BSSI") known as the Select Program, which entitled members who purchased at least one unregulated service and satisfied certain eligibility criteria to certain publicly-available benefits. Under the Select Consumer Program, residential customers could receive benefits such as a coupon book, movie tickets, a newsletter, and discounts on BellSouth phone equipment. Under the Select Business Program, business customers could earn points redeemable for credits (including cash in the form of a check issued by BSSI), goods, and services.

BST respectfully submits that the Hearing Officer erred in finding that BST's participation in the Select Program constituted unjust discrimination in violation of

Tenn. Code Ann. § 65-4-122(a). Such finding is not supported by competent evidence in the record and is contrary to applicable law. Furthermore, the Authority is not a court and therefore may not hear any action or issue findings regarding the alleged violation of section 65-4-122. Even if the Authority had jurisdiction to issue findings, referral of such findings to the district attorney is not authorized by controlling law.

BST also submits that the Hearing Officer erred in concluding that operation of the Select Program constituted violation of Authority Rules 1220-4-2-.06(1) and 1220-4-1-.03, .04, and .06 and the Authority's *Final Order in Docket No. 96-01331*. Because the Select Program did not constitute a regulated service, the Hearing Officer erred in concluding that BST violated tariff and resale requirements with respect to the Program. Although BST does not challenge the Hearing Officer's calculation of the fine pursuant to Tenn. Code Ann. § 65-4-122(a),¹ BST challenges the Hearing Officer's decision to impose *any* fine because, as explained below, BST committed no regulatory violations.

In addition to the legal and factual issues arising from the Initial Order that are specifically addressed in this petition for appeal, BST expressly incorporates and relies upon all arguments set forth in the post-hearing brief it filed in this docket, a copy of which is attached hereto as Exhibit A. BST respectfully submits that the Initial Order is erroneous to the extent that it is inconsistent with the arguments set forth in the attached brief.

¹ BST has submitted a check in the amount of the imposed fine to the Authority.

I. THE HEARING OFFICER'S FINDING THAT BST VIOLATED TENN. CODE ANN. § 65-4-122(a) IS NOT SUPPORTED BY COMPETENT EVIDENCE AND IS CONTRARY TO LAW

Section 65-4-122(a) defines "unjust discrimination" as the use of a "special rate, rebate, drawback, or other device" to "charge[], demand[], collect[], or receive[] from any person a greater or less compensation" than what is "charge[d], demand[ed], collect[ed], or receive[d] from any other person for service of a like kind under substantially like circumstances and conditions." Tenn. Code Ann. § 65-4-122(a).

The Hearing Officer's finding that BST violated section 65-4-122 is not supported by competent evidence. First, the record contains no evidence that the Select Program actually was used as a "device" to collect a greater or less compensation for regulated service from any one customer as compared to that collected from any other customer. Second, even assuming that the program did constitute a device to collect greater or less compensation for regulated services (which BST strongly denies), the record contains no evidence that the Select Program resulted in discrimination among similarly situated customers.

A. BST charged, demanded, collected, or received the tariff rate from all customers

The Hearing Officer, while declining to address whether operation of the Select Program constituted a "rebate" as used in section 65-4-122(a), opted to find that the program constituted a "device" used by BST to charge or receive different rates from persons receiving the same services. Initial Order at 30. In so finding,

the Hearing Officer specifically rejected uncontroverted evidence from BST that both Select members and non-members were in fact charged and billed tariffed rates and that BST did not return these tariffed rates that were collected to any customer. See Docket No. 01-00868, Post-Hearing Brief of BST, pp. 25-28 (Mar. 4, 2002) (citing to testimony from various witnesses). Moreover, despite the fact that all customers were actually charged the same rate for regulated services and that the tariffed rates which BST billed and collected for regulated services were recorded by BST in regulated accounts, the Hearing Officer found that the controlling factor in the analysis was the perspective of the customer. Initial Order at 29-30. Because a customer mistakenly could assume that any credit earned applied to regulated services, the Hearing Officer reached the conclusion that the Program actually resulted in customers being charged different rates for the same regulated services. *Id.*

The Hearing Officer's determination that "customer perspective" controls the analysis of whether a common carrier has charged similarly situated customers different rates for the same regulated services is not supported by law. When interpreting statutes, "legislative intent should be determined from the plain language of the statute, 'read in context of the entire statute, without any forced or subtle construction which would extend or limit its meaning.' " Initial Order at 25 (quoting *Kultura, Inc. v. Southern Leasing Corp.*, 923 S.W.2d 536, 539 (Tenn. 1996) (quoting *National Gas Distrib., Inc. v. State*, 804 S.W.2d 66, 67 (Tenn. 1991))). Under the plain language of section 65-4-122, unjust discrimination

consists of a common carrier collecting or receiving from one person a greater or less compensation than that received from a similarly situated person. Nothing on the face of the statute (or the hundred years plus body of case law interpreting the statute) suggests that "customer perspective" can or should be substituted for actual proof that one customer was charged more than another for the same regulated service. Insertion of this factor into the statutory analysis results in an improper extension of the statute's meaning.

Furthermore, even assuming that customer perspective is an appropriate factor to consider in determining whether a violation of section 65-4-122(a) has occurred, the record does not contain sufficient evidence from any customer regarding his or her perspective with respect to points redeemed under the Select Program. Neither the private complainants nor the CAPD introduced testimony of customers affected by the Select Program. Lacking factual evidence from any affected customer, the Hearing Officer cites to testimony from BST's expert witness, Aniruddha Banerjee, that a customer "may perceive" a reduction of the tariffed amount. Initial Order at 29-30 (citing Banerjee Pre-Filed Rebuttal Testimony, p.5 (Jan. 20, 2002)). However, the statement cited by the Hearing Officer is taken out of context and overlooks Mr. Banerjee's actual testimony that while a customer "may perceive [such a reduction], that would not change the fact that the full tariffed rate is being recorded on BST's regulated books of account." Banerjee Pre-Filed Rebuttal Testimony, p.5 (Jan. 20, 2002). In sum, the Hearing Officer's conclusory determination as to what was or was not reasonable for

customers to perceive is simply speculation that is unsupported by the factual evidence in the record. Accordingly, the Hearing Officer's finding that the Select Program involved the use of a device that violated section 65-4-122(a) must be rejected.

B. The Record Contains No Evidence That the Select Program Unjustly Discriminated Between Similarly Situated Customers

Even if the Hearing Officer's finding that the Select Business Program operated as a device used to charge different rates for the same tariffed services (which it clearly does not), the Select Program does not violate section 65-4-122(a) because the Program did not unjustly discriminate among similarly-situated customers.

1. Section 65-4-122(a) only prohibits discrimination that is "unjust"

Section 65-4-122(a) was modeled upon, and is nearly identical to, the Interstate Commerce Act of 1887 ("ICA"). *See Southern Ry. Co. v. Pentecost*, 330 S.W.2d 321, 323-25 (Tenn. 1959) (citing to cases construing ICA for purposes of interpreting Tennessee unjust discrimination statute). Federal courts interpreting the ICA have made clear that the mere use of a rebate or special rate to charge one customer less than it charges another does not, in and of itself, violate the statute. That is, "[e]very rate which gives preference or advantage to certain persons . . . is discriminatory But discrimination is not necessarily unlawful." *Nashville, C. & St. L. Railway v. Tennessee*, 262 U.S. 318, 322

(1923). Rather, "only that discrimination which is unreasonable, undue, or unjust" is prohibited by the statute. *Id.*

In examining what constitutes "unreasonable, undue, or unjust" discrimination, the United States Supreme Court has held that common carriers are "only bound to give the same terms to all persons alike under the same conditions and circumstances, and any fact that produces an inequality of condition and a change of circumstances justifies an inequality of charge." *Interstate Commerce Commission v. Baltimore & Ohio R. Co.*, 145 U.S. 263, 283-84 (1892). Accordingly, in *Baltimore & Ohio R. Co.*, the Supreme Court held that a railway company did not commit unjust discrimination by its use of "party rates" whereby parties of ten or more persons traveling together on one ticket could obtain cheaper rates than the rate charged to individual customers. *Id.* at 284. That is, volume discounts do not constitute unjust discrimination. *Id.* at 281-82 ("To bring the present case within the words of this section, we must assume that the transportation of ten persons on a single ticket is substantially identical with the transportation of one, and, in view of the universally accepted fact that a man may buy, contract, or manufacture on a large scale cheaper proportionately than upon a small scale, this is impossible.").

Pursuant to this reasoning, the mere fact that the Select Program was available only to customers who satisfied preset eligibility requirements does not constitute unjust discrimination. Even if BST is found to have offered Select-eligible customers a lesser rate than that offered to non-Select-eligible customers,

such discrimination is not unlawful because Select-eligible customers are not similarly situated to non-Select-eligible customers. That is, a customer who satisfies a minimum monthly spend requirement is not similarly situated to a customer who spends less than the minimum amount. Therefore, charging a customer who purchases a greater amount of a common carrier's services a lesser rate than that charged to other customers does not violate section 65-4-122.²

With respect to the similarly-situated customers, *i.e.*, all customers eligible for the Select Program, the evidence in the record shows that the Select Business Program was available to all BellSouth customers who met the eligibility requirements of the respective offerings.

2. The Select Business Program was available to all similarly-situated customers.

Richard Tice, President of BSSI, testified that "[i]n 1999, for instance, BSSI sent materials to *all potentially eligible customers* by direct mail" and also described the program on the company's Internet site. (Tice Direct at 6.). (emphasis added). In addition to the direct mail campaign and the Internet posting, Tice noted that both BellSouth Advertising & Publishing Corporation ("BAPCO") representatives and BST Small Business Services initiated efforts to inform potentially eligible customers of the program. *Id.* at 6-7.

² Establishing volume and term eligibility requirements for offerings and making the offerings available only to those who meet those eligibility requirements is a time-honored and perfectly acceptable practice. In fact, AIN/DeltaCom witness Mr. Gillan acknowledged that volume and term contracts are authorized practices in Tennessee, and he acknowledged that volume and term requirements are not inherently discriminatory. He also acknowledged that if a customer did not meet the criteria for the Select program because it did not have \$100 worth of BST services, that

Don Livingston, former Senior Director of BST Small Business Services, a division of BST, testified that all versions of the Select program were available to all customers who met the eligibility requirements. (Tr. at 210). Livingston testified that several methods were used to inform eligible customers of the program, including direct mailings, contacts by BAPCO representatives, in-bound calls,³ out-bound calls, and a web site (*see* www.bellsouthselectbusiness.com). (Livingston Direct at 8.). Although AIN/DeltaCom witness Mr. Gillan made unsubstantiated and conclusory allegations that certain aspects of the Select Business Program could be discriminatory, he conceded that he is not aware of any customer that wished to participate in the Select Business Program and that was eligible to do so but that was denied the opportunity to participate. (Tr. at 61).

CAPD witness Dr. Brown also suggested that BellSouth did not make the Select Business Program available to some customers who are eligible for the program, but that suggestion clearly was based on a single excerpt from the deposition of Don Livingston. (Brown Direct at 10). On cross examination, however, Dr. Brown acknowledged that during his deposition, Mr. Livingston also stated that "[w]e look in our database and see which customers are eligible for the program, and then we try to invite them to the program. It could be a direct mail piece, or the sales force could mention it to the customer." (Tr. at 124). When

customer would be like a customer that did not meet the volume requirement in a volume and term contract. (Tr. at 61-62).

³ A notation is placed on BellSouth's record of all customers that are eligible for the Select Business Program, and when an eligible customer places a call to a BST service representative, that representative typically invites the customer to join the Select Program. (Tr. at 160-61; 195).

faced with this portion of Mr. Livingston's deposition, Dr. Brown claimed that it was "a contradiction, according to what Mr. Tice said, who said that we've had a rolling criteria." (*Id.*).

The fact that the eligibility requirements for various versions of the Select Program changed over time, however, does not contradict the fact that each version of the Program was available to all customers that met the eligibility requirements that were in effect at any given time. Moreover, no evidence in the record suggests that the Select program was not available to any customer that met the program's eligibility requirements.

3. Conclusion

Without citation to any factual evidence in the record, the Hearing Officer found it "reasonable to conclude that BellSouth customers who purchased regulated services were not provided the opportunity to enroll in the program because they had no notice of the existence of the program." Initial Order at 28.⁴ As set forth above, this assumption is not supported by the factual evidence in the record. Moreover, the Hearing Officer's reasoning improperly shifts the burden of proof to BST to prove a negative by showing that there was no customer who was not given notice of the program. The statute does not require BST to prove that all eligible customers received notice of the program. Rather, section 65-4-122(a) is violated only upon proof that similarly situated customers have been charged different rates for the same service. Because the record is devoid of evidence that

any customer that wanted to enroll in the program and that met the program's eligibility requirements was denied enrollment in the program, the Hearing Officer's finding must be rejected.

C. The Authority is Not a Court as that Term is Used in Section 65-4-122(e)

Section 65-4-122 prohibits a common carrier or public service company from engaging in unjust discrimination, extortion, or the making or giving of undue preferences. See Tenn. Code Ann. § 65-4-122(a), (b), and (c). Subsection (d) directs that any corporation found guilty of the aforementioned prohibited conduct "shall be fined" as set forth in the statute. *Id.* § 65-4-122(d). Lastly, subsection (e) directs that an action for the violation of section 65-4-122 "may be brought by any person . . . before any court having jurisdiction to try the same." *Id.* § 65-4-122(e).

The Authority "is an administrative agency exercising co-mingled legislative, executive, and judicial functions,"⁵ and both the statutes governing the Authority⁶ and the Uniform Administrative Procedures Act⁷ clearly distinguish between the Authority and a court. The Authority, therefore, is not a court, and thus lacks

⁴ Lack of notice is not mentioned in the Hearing Officer's exhaustive list of elements necessary to prove a violation of § 65-4-122. See Initial Order at 25 (setting forth elements).

⁵ *Tennessee Cable Telev. Ass'n v. Public Serv. Comm'n*, 844 S.W.2d 151, 158 (Tenn. Ct. App. 1992).

⁶ See, e.g., Tenn. Code Ann. §§ 65-2-109(a) ("The authority shall not be bound by the rules of evidence applicable in a court . . .").

⁷ See, e.g., Tenn. Code Ann. §§ 4-5-221(c) (setting forth the conditions under which the text of the rules appearing in the administrative code may be "used in all courts, agencies, departments, offices of and proceeding in the state of Tennessee"); 4-5-223(b) (an agency's declaratory order is binding between the agency and the parties "unless altered or set aside by the agency or a court in a proper proceeding").

jurisdiction to hear any action or issue findings regarding the alleged violation of section 65-4-122.⁸

D. The Authority Is Not Authorized to Refer Violations of Section 65-4-122(a) to the District Attorney General for Consideration By That Office

The Hearing Officer has directed that, pursuant to section 65-3-120, the findings of the Initial Order that BST violated section 65-4-122(a) be transmitted to the District Attorney General for consideration by that office. Initial Order at 47. Chapter 3 of Title 65 of the Tennessee Code contains three sections that address the authority of the Authority to refer alleged violations of chapter 3 (codifying regulation of railroads by the Department of Transportation) and chapter 5 (codifying regulation of rates by the Authority) to the district attorney general and the district attorney general's duty to prosecute such referrals. See Tenn. Code Ann. §§ 65-3-119, 120, and 121.⁹

Section 65-3-120(c) directs that violations of chapter 3 or chapter 5 of Title 65 and the facts in support of such violations must be reported to the district

⁸ Moreover, the Authority has no statutory power to impose a fine upon a public utility for having charged a rate that it determines is discriminatory or unduly preferential. While section 65-4-120 generally allows the TRA to impose penalties of \$50.00 per day for violation of "any lawful order, judgment, finding, rule or requirement of the authority," section 65-4-122 specifically addresses actions alleging extortion or unjust discrimination, and it provides that such actions are to be brought "before any court having jurisdiction to try the same." Under Tennessee law, a specific statutory provision will control over a more general statutory provision. See *Washington v. Robertson County*, 29 S.W.2d 466, 475 (Tenn. 2000). The specific statutory provisions of section 65-4-122, therefore, control over the general statutory provisions of section 65-4-120, and the TRA has no authority to impose fines for discrimination or extortion. If this were not the case, the Authority could enact a rule that says exactly what section 65-4-122 says, impose fines for a violation of that rule, and circumvent the statutory requirement that actions seeking such fines be brought before a court.

⁹ These statutes are applicable to the TRA because section 65-4-105 provides that the TRA possesses powers conferred by chapter 3 and chapter 5. See Tenn. Code Ann. § 65-4-105(a).

attorney general.¹⁰ Tenn. Code Ann. § 65-3-120(c). Section 65-3-119(a), in turn, places upon the district attorney general the "duty" to bring suit in the name of the State on the relation of the Department of Transportation or the Authority to recover any penalty imposed by chapter 3 or chapter 5. All penalties and fines recovered must be paid into the state treasury. See Tenn. Code Ann. § 65-3-119(d). What is of controlling significance in this case is the fact that sections 65-3-119, 120, and 121 do *not* provide that their provisions are applicable to Chapter 4.

It is well established that "[w]hen a statute is unambiguous, it must be interpreted according to its plain meaning." *Atchley v. Life Care Center*, 906 S.W.2d 428, 431 (Tenn. 1995). Sections 65-3-119, 120, and 121 are clear and unambiguous. By their plain terms, these statutes apply only to violations of chapter 3 and chapter 5 of Title 65. Because section 65-4-122 is contained in neither chapter 3 nor chapter 5, the Authority lacks any legal basis for referring alleged violations of section 65-4-122 to the district attorney general for prosecution. Sections 65-3-119, 120, and 121, therefore, neither require nor permit the Authority to report violations of section 65-4-122 to the district attorney general. Nor do these sections place upon the district attorney general the duty to bring suit to recover any penalty imposed by section 65-4-122. Instead, as discussed above, the General Assembly has elected to allow a private party to bring an action for the violation of section 65-4-122 in court.

¹⁰ Section 65-3-119(a) directs the TRA to turn over "facts" in support of alleged violations—

In sum, section 65-3-120 directs the Authority to refer alleged violations of chapter 3 and chapter 5 of Title 65 to the district attorney general, who, pursuant to section 65-3-119 and sections 65-3-121, may institute a legal action to recover penalties on behalf of the State. By their plain terms, these statutes do not apply to alleged violations of section 65-4-122, which is contained in chapter 4 of Title 65. Rather, section 65-4-122 specifically authorizes "any person" to bring an action against a corporation that allegedly has violated the statute. According to the statutory authority, no legal basis supports the Authority's referral of alleged violations of section 65-4-122 to the district attorney general.

II. THE SELECT PROGRAM IS AN EXAMPLE OF THE UNREGULATED OPERATIONS OF BELL SOUTH PRICING ITS UNREGULATED PRODUCTS AND SERVICES AS IT DEEMS APPROPRIATE

The Hearing Officer ruled that, in operating the Select Program,¹¹ BST failed "to tariff the Select Program, to charge customer's the tariff rate, and to provide the Select Program for resale." Initial Order at 47. The conclusions of the Hearing Officer are contrary to law because the Select Program is an example of the unregulated operations of BellSouth pricing its unregulated products and services as it deems appropriate, which is not subject to tariff or resale requirements.

A. Under Tennessee law, the regulatory requirements that apply to the regulated operations of a public utility like BST do not apply to the utility's unregulated operations.

not findings of facts contained in an agency order made after a hearing in a contested case.

¹¹ Throughout the Initial Order, the Hearing Officer repeatedly fails to distinguish that the Select Program was operated by BSSI—not by BST. That is, BST participated in the Select Program that was operated by BSSI.

For more than a century, courts in this country have recognized that the common law and statutory obligations of a public utility apply only to the extent that it is providing a regulated public service. Those obligations simply do not apply to the extent that a public utility engages in other, unregulated business. More than 125 years ago, for instance, the New York Court of Appeals stated that:

The carrier . . . may carry on, in connection with his business of carrier, any other business, and may use his property in any way he may choose to promote his interests, not inconsistent with the duty he owes to passengers. The vessel or vehicle which he uses is his own, and except to the extent to which he has devoted it to public use, by the business in which he has engaged, he may manage and control it for his own profit and advantage, to the exclusion of all other persons.

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The passenger has the right to be carried and to enjoy equal privileges with others, or at least to be exempt from unjust or offensive discrimination in favor of other passengers. But he has no right to demand that in matters not falling within the contract of carriage, the carrier shall surrender in any respect, rights incident to his ownership of his property.

Barney v. Oyster Bay and Huntington Steamboat Co., 67 N.Y. 301, 302-03 (Ct. App. N.Y. 1876). *Accord Norfolk & Western Ry. Co. v. Old Dominion Baggage Co.*, 37 S.E. 784 (Va. 1901) (relying on various decisions by the common law courts of England, the Court rejected discrimination challenges to a railroad's decision to grant a single company the right to enter the railroad's station to solicit incoming baggage).

Tennessee decisions embrace these same principles. In *Memphis News Pub. Co. v. Southern Ry. Co.*, 75 S.W. 941, 946 (Tenn. 1903), for instance, the Supreme Court of Tennessee stated that

It has been held that a common carrier of passengers may establish in his car or vessel an agency for the delivery of passengers' baggage, and may exclude all other persons from entering upon it for the purpose of soliciting or receiving orders therefor. It has been also held that a railroad corporation may exclude from its right of way one party who comes to sell lunches to its passengers and admit another to this privilege, if it pleases and that a steamship corporation and a railroad may equally give preferential privilege to certain hackmen to solicit passengers on their property and exclude others.

The Court then explained that these decisions rest on the rule that

save as to duties which he owes to the public, a common carrier has as complete dominion over its property, whatever it may be, as does every other owner, and may therefore exclude from or admit to it, at its will, particular persons. In other words, *an inhibition upon preferential indulgences extends only to those services which inhere in or pertain to the office of a common carrier, and beyond these he is entitled to the absolute control of his own, and that in none of these matters covered by these cases does he owe anything to the public.*

Memphis News Pub. Co. v. Southern Ry. Co., 75 S.W. 941, 946 (Tenn. 1903)(emphasis added).

The Tennessee Court of Appeals reaffirmed these principles in 1962 when it noted that "there is a vast difference between a public service corporation acting in its capacity as a public utility and acting outside of that capacity by contract made limiting liability for its negligence or mistakes in that type of service." *Smith v. Southern Bell Tel. & Tel. Co.*, 364 S.W.2d 952, 956 (Ct. App. Tenn. 1962). More specifically, the *Smith* Court held that "the principle which enables courts to strike

down and condemn clauses affecting the performance by the company of its functions as a public utility is limited to the area in which the public services are rendered and has *no application whatever to the domain in which the public utility may freely contract in its private capacity.*" *Smith v. Southern Bell Tel. & Tel. Co.*, 364 S.W.2d 952, 957 (Ct. App. Tenn. 1962) (emphasis added).

B. The Select Business Program is an example of the unregulated operations of BellSouth pricing unregulated products and services as it deems appropriate.

These decisions apply with full force to the Select Business Program. The program is an example of the unregulated operations of BellSouth using a legitimate and common practice -- a customer loyalty program -- and pricing unregulated products and services as it deems appropriate, just like unregulated companies do, and just like BST's competitors do. This becomes obvious in light of the uncontroverted testimony of BST's accounting witness, Mr. Thomas Lohman.

Mr. Lohman explained that a BST customer must purchase at least one non-regulated product or service to participate in the Select Business Program. The customer is billed the full rate for the non-regulated service each month, and the revenue is recorded as non-regulated. When a customer earns points that are charged to BST, the total cost of those points (which can be earned on both regulated and non-regulated purchases) is charged (debited) to non-regulated revenues. Thus, BST's entire cost of the program points is borne by the non-regulated lines of business, and there is neither a reduction of the regulated

revenues nor a discount to tariff rates. (See Lohman Direct at 4). As Mr. Lohman summarized:

all regulated services are charged to the customer at the appropriate tariffed rate, and the revenues (at the tariffed rates) are recorded and reported in financial reports accordingly. The cost of the points is charged to non-regulated revenues, thus there is no discount or reduction of regulated revenues under the offering that is described in the complaints filed by XO and AIN.

(Lohman Direct at 5).¹²

In other words, under the Select Program in effect at the time of the hearing, BST bills, collects, and keeps the entire tariffed rates for the regulated services that Select members purchase -- none of those rates are handed back to the customer in the way of points or otherwise (irrespective of whether points were redeemed for a bill credit, for unregulated products or services, or for a check). BST bills Select members the full price for the unregulated products and services they purchased, and its unregulated operations give back some of the price of those unregulated products and services in the form of redemption of points for cash or for unregulated products or services. Regardless of how many points are earned, the points have no value absent unregulated revenue against which the points can be redeemed. As the cases discussed in Section II.A of this petition for appeal show, it is just as appropriate for the unregulated operations of a public utility like BST to do this as it is for an airline to run a frequent flier program or for a shoe store to run a "buy one pair, get a second pair for half price" sale.

¹² Mr. Lohman also explained that in addition to the costs of the points, the administrative costs of the Select Business Program also are being borne by the non-regulated operations of

C. The TRA has no statutory authority to require BST to make the Select Business Program available for resale.

To the extent that the CLECs argue that the Select Business Program is subject to resale, they are simply mistaken. As explained above, the Select Business Program is the form through which the unregulated operations of BST prices its unregulated products and services as it deems appropriate. Just as discount plans for paging services, wireless services, web hosting services, and internet access services are not subject to the resale provisions of the federal Telecommunications Act of 1996, the Select Business Program is not subject to those resale provisions.

CONCLUSION

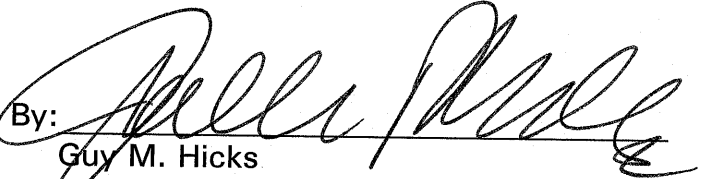
BST respectfully requests the entry of a Final Order reversing the Hearing Officer's finding that BST violated section 65-4-122(a) because the record does not contain sufficient evidence to support that finding. Additionally, the Authority should rule that the Authority is not a court having jurisdiction to issue findings regarding violation of section 65-4-122 and reverse the Hearing Officer's referral of alleged violations of section 65-4-122 to the district attorney general because such referral is not authorized by controlling law. The Authority should also reverse the Hearing Officer's finding (1) that BST failed to tariff the Select Program, (2) that BST failed to charge customers the tariff rate, and (3) that BST failed to provide the Select Program for resale. Accordingly, the Authority should reverse the fine

BellSouth. (Lohman Direct at 6-7).

imposed and reverse the order to cease operations of any portion of the Select Program.

Respectfully submitted,

BELLSOUTH TELECOMMUNICATIONS, INC.

By: 

Guy M. Hicks

Joelle J. Phillips

333 Commerce Street, Suite 2101

Nashville, Tennessee 37201-3300

(615) 214-6301

Patrick W. Turner

675 W. Peachtree St., NE, Suite 4300

Atlanta, Georgia 30375



BellSouth Telecommunications, Inc.
333 Commerce Street, Suite 2101
Nashville, TN 37201-3300

guy.hicks@bellsouth.com

REC'D TN
REGULATORY AUTH.
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February 19, 2002

EXECUTIVE SECRETARY

Guy M. Hicks
General Counsel

615 214 6301
Fax 615 214 7406

VIA HAND DELIVERY

David Waddell, Executive Secretary
Tennessee Regulatory Authority
460 James Robertson Parkway
Nashville, TN 37238

Re: *Complaint of XO Tennessee, Inc. Against BellSouth
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Docket No. 01-00868

Dear Mr. Waddell:

Enclosed are the original and thirteen copies of BellSouth's Post-Hearing Brief. Copies of the enclosed are being provided to counsel of record.

Very truly yours,

A large, stylized handwritten signature in black ink, appearing to be "Guy M. Hicks".

Guy M. Hicks

GMH:ch

BEFORE THE TENNESSEE REGULATORY AUTHORITY
NASHVILLE, TENNESSEE

Re: *Complaint of XO Tennessee, Inc. Against BellSouth Telecommunications, Inc.*

Complaint of Access Integrated Networks, Inc. Against BellSouth Telecommunications, Inc.

Docket No. 01-00868

POST-HEARING BRIEF OF BELL SOUTH TELECOMMUNICATIONS, INC.

In accordance with the Hearing Officer's directive during the February 4, 2002 hearing in this docket, BellSouth Telecommunications, Inc. ("BST") respectfully submits its Post-Hearing Brief. In this brief, BST:

describes the Select Business Program and explains recent modifications to the program;

describes the combined offering and explains steps that have been taken to address the offering;

demonstrates that neither the Select Business Program nor the combined offering have an adverse impact on competition in the local exchange market in Tennessee;

explains that under Tennessee law, it is just as appropriate for BellSouth's unregulated operations to run the Select Business Program as it is for an airline to run a frequent flier program or for a shoe store to run a "buy one pair, get a second pair for half price" sale;

explains that the Select Business Program is not a rebate or a reduction off tariffed rates for regulated services;

explains that neither the Select Business Program nor the combined offering unjustly discriminates between similarly-situated customers;

explains that the attacks on the 2001 Key Program are without merit; and

demonstrates that the Complainants and Intervenors have requested remedies that the Hearing Officer is not authorized to grant and to which they are not entitled.

The Hearing Officer, therefore, should dismiss the Complaints filed by Access Integrated Networks, Inc. ("AIN") and XO Tennessee, Inc. ("XO") with prejudice and deny AIN's Motion to Open a Show Cause Proceeding.

I. DESCRIPTION OF THE SELECT BUSINESS PROGRAM AND THE COMBINED OFFERING.

The Complaints that AIN and XO originally filed address an offering that purports to provide business customers with three months of service at no charge or with three months of free service. See Complaint of AIN at ¶4; Complaint of XO at ¶3. As explained in more detail below, the offering referenced in these Complaints involved the combined use of the 2001 Key Business Discount Program ("2001 Key Program") and the Select Business Program. (See Livingston Direct at 2-3).¹ AIN and XO later amended their Complaints to challenge the legality of the Select Business Program on a stand-alone basis. This section of BST's brief: (a) describes the Select Business Program and explains recent modifications to the program; and (b) describes the combined offering and explains steps that have been taken to address the offering.

A. The Select Business Program

The original Select Business Program was launched in Tennessee in late 1999. Since then, the original program, the Gold program, the Silver program, and

¹ For ease of reference, BST will refer to this offering as the "combined

the Platinum program have been offered, but today only one version of the Select Business Program -- the Platinum program -- is in effect. The discussion below addresses the Platinum program.² Moreover, because the Platinum program is the only Select program in effect today, and in order to maintain consistency between the terminology used in testimony and the terminology used in this brief, all remaining references in this brief to the "Select Business Program" are references to the Platinum program unless otherwise indicated.

1. Description of Select Business Program

The Select Business Program is a loyalty marketing program similar to a frequent flyer program. Small business customers that have at least \$100 in BST monthly billing (including at least one non-regulated service) or at least \$100 in BellSouth Advertising and Publishing Corporation ("BAPCO") monthly billing are eligible to enroll in the Select Business Program.³ Customers can enroll in the Select Business Program whether or not they purchase any regulated services from BST. For example, a qualifying customer that spends more than \$100 per month on Yellow Pages advertising is eligible to enroll in the program, even if the customer purchases no regulated services from BST. Customers that are enrolled in the

offering" throughout this brief.

² Appendix A to this brief describes the original program, the Gold program, and the Silver program.

³ The terms and conditions for the Platinum program also require that a customer have a good account pay status. (Tr. at 222). At one time, participating customers were required to authorize BellSouth to use CPNI to facilitate the customer's participation in the program, but this requirement has now been eliminated. (Tr. at 162-63).

program are awarded standard Select points based on their level of monthly billing as follows: one point for every dollar spent with BST; one point for every dollar of Cingular Wireless LLC ("Cingular")⁴ billing reflected on a combined bill for BST and Cingular services; and one point for every three dollars spent with BAPCO. (See Tice Direct at 3-5).

BellSouth Select, Inc. ("BSSI") also has awarded bonus points (in addition to the standard points) to customers. Among other things, these bonus points have been awarded to customers who filled out a customer satisfaction survey, who reached an "anniversary" date in the Select Business Program, or who purchased specified business services. (See Tice Direct at 3). These types of bonus points were awarded to each customer who met the criteria for receiving the bonus points. In 2001, BSSI and BST's Small Business Services operations also agreed to an additional amount of bonus points that Small Business Services personnel could award in certain situations. (See *id.* at 4). Prior to the modifications discussed below, participating business customers were allowed to redeem standard and/or bonus points for any of the following: discounts on non-regulated products and services including pre-paid phone cards; Select Partner awards (CPE, travel awards, etc.) provided by companies unaffiliated with BellSouth; and credits against the customer's BellSouth bill. (See *id.* at 6).

⁴ Cingular now operates certain wireless properties formerly operated by BellSouth Mobility, Inc.

The non-regulated operations of participating BellSouth companies have been (and continue to be) charged \$.025 per point awarded under the original program, the Gold program, the Silver program, and the Platinum program. For example, if a qualifying business customer participating in the program has monthly billing of \$150 from BST and \$300 from BAPCO, the customer would receive 250 Select points each month $[150 + (300/3)]$. To cover the cost of these points, the non-regulated operations of BST would be charged \$3.75, and BAPCO would be charged \$2.50 when the points were awarded. As another example, a qualifying business customer that had no BST services, but that had \$375 in monthly billing from BAPCO, would receive 125 Select points $(\$375/3)$. To cover the cost of these points, BAPCO would be charged \$3.13 when the points were awarded. (See Tice Direct at 5; Lohman Direct at 3-7).

2. Recent Modifications to the Select Business Program.

Since its inception, the intent of the Select Business Program has been that, over time, the amount of a customer's total non-regulated spending would exceed the value of the total points redeemed by that customer.⁵ This has been the case for more than 97% of the Tennessee customers that have enrolled in the program since its inception.⁶ That means, of course, that less than 3% of the time, the amount of a customer's total non-regulated spending did not exceed the total value

⁵ This has been the intent of the original Select Business Program, the Gold program, the Silver program, and the Platinum program.

⁶ This includes all participants in the original, Gold, Silver, and Platinum programs.

of the points redeemed by that customer. In order to prevent such unintended results in the future, BSSI has enhanced its systems to ensure that the value of points redeemed by a customer does not exceed the amount of the customer's aggregate non-regulated spending since joining the program less the value of points that customer has already redeemed.⁷ This change in redemption policy has been explained to all program participants. (See Tice Direct at 10; Tr. at 140-41).

Additionally, points may no longer be redeemed in the form of credits against the customer's bill, whether automatic or at the option of the customer. (See Tice Direct at 10). Instead, this redemption option has been replaced with the option of redeeming points for cash in the form of a BSSI check that can be used for any purpose desired by the customer. (*Id.*). This was done to avoid any misperception that the customer was receiving free regulated services by way of a bill credit. (Tr. at 156).

Finally, even though the other safeguards described above are more than adequate, bonus points are no longer awarded under the program in connection with subscription to a regulated BST service. (See Tice Direct at 10).⁸

⁷ As explained below in Section IV. of this brief at footnote 23, this provides further assurance that none of the tariffed rates that a given customer pays for regulated services are handed back to the customer in the form of redeemed points.

⁸ AIN/DeltaCom witness Mr. Gillan testified that in general, he has no concerns with awarding points based only on dollars spent on unregulated services. (Tr. at 98).

B. The Combined Offering

As noted above, the offering referenced in the original Complaints filed by AIN and XO involved the combined use of the 2001 Key Program⁹ and the Select Business Program. (Livingston Direct at 2-3). The 2001 Key Program is a tariffed offering that is available to both new and existing Tennessee customers in specific areas that meet certain criteria specified in the tariff.¹⁰ The Select Business Program is described above in Section I.A. of this brief.

The Select Business Program had been reviewed and approved by BSSI's attorneys, and the 2001 Key Program had been reviewed and approved by BST's attorneys. The BST employee responsible for developing and implementing the combined offering thought that combining two approved programs was a minor change, so he did not take the combined offering or any materials related to the combined offering to BST's attorneys for review and approval. That employee testified at the hearing and acknowledged that he made a mistake in judgment. As explained below, that employee has been disciplined by BST. (See Livingston Direct at 6).

⁹ One customer accepted a combined offering that involved the tariffed 2000 Key Business Discount Program and not the 2001 Key Program. (See Livingston Direct at 4-5). The combined offering that the remaining 62 Tennessee customers accepted involved the tariffed 2001 Key Program. (*Id.*).

¹⁰ A copy of the 2001 Key Program tariff is attached to the Direct Testimony of Don Livingston as Exhibit DL-1. Attachment 1 to this Brief is a copy of that exhibit.

1. Description of Combined Offering

Under the combined offering, BellSouth sales channels offered to enroll customers in the Select Business Program at the same time that they subscribed to certain BST regulated services in connection with the 2001 Key Program tariff. Depending upon the length of the 2001 Key Program term election made by the customer and upon whether the customer chose the hunting feature, the customer would receive bonus Select points with a value equal to up to three months of the customer's total BST charges (regulated and non-regulated). Further, depending on the number of bonus Select points awarded, the points would be credited to the customer's Select account in the first, sixth and twelfth months of Select participation. The bonus Select points were redeemed as a credit against the customer's bill in the month in which the points were awarded. (See Livingston Direct at 3).

Sixty-three (63) small business customers in Tennessee accepted the combined offering. (See Tice Direct at 8). While BST marketed the combined offering primarily to former BST customers, the combined offering was available to any BST customer that signed a 36-month term election under the 2001 Key Program and who enrolled in the Select Business Program. (See Livingston Direct at 5). In fact, four of the 63 Tennessee customers that accepted the combined offering were receiving service from BST when they accepted the offer. (See *id.*; Tr. at 244; BST's Response to Staff's First Data Request, Item No. 6, Attachment 6.2) (copy attached as Attachment 2).

Unfortunately, due to improper program implementation, including failure to obtain requisite approvals and the use of defective training materials for those sales channels engaged in efforts to sell the combined offering, the benefits of these two separate offers were not accurately described to some of the customers that were contacted. Rather than describing the separate sets of benefits for the 2001 Key Program (discounts on regulated services pursuant to filed promotions) and the Select Business Program (earned points that can be redeemed for multiple non-regulated benefits, including a credit against the customer's bill), certain sales personnel described the combined offering as including "free" or "complementary" months of local service. This was not the intent of the Select Business Program. (See Tice Direct at 10; Livingston Direct at 3-4).

2. Steps Taken to Address the Combined Offering

When BST learned that the combined offering had been implemented without requisite review and approvals, BST took quick and appropriate action. First, BST ceased marketing the combined offering, and no customers have been allowed to sign up for that offering. (See Shaw Direct at 4). Additionally, the president of BST's Small Business Services operations sent a letter to all customers who had service with BST in Tennessee pursuant to the combined offering. Attached to that letter was a letter from the president of BSSI that explained to those customers how the bonus points would actually be awarded and the benefits available under the Select Business Program.

The letter from BST's Small Business Services operations advised customers that if they were dissatisfied with this explanation, they could terminate their 2001 Key Program term agreement with no termination liability or forfeiture of previously received discounts and either (1) remain a BST customer participating in the Select Business Program; or (2) if applicable, return to their previous local provider, at no cost to the customer. (See Shaw Direct at 4; Tice Direct at 9). BST took these actions before any customer that had accepted the combined offering redeemed three sets of bonus points under the offering. (See Tr. at 155).

BST also took appropriate action to address the fact that the combined offering was implemented without the requisite internal approvals. The employee who was responsible for implementing the combined offering appeared at the hearing and testified that a letter in his personnel file warns that he can be terminated for similar actions in the future. He also testified that he has been transferred to a new position and that he will receive no stock options or pay raise this year. (See Livingston Direct at 6). Additionally, BST has ensured that all Small Business Services employees who are involved in the development of marketing offerings understand the requisite review and approval process that must be followed before any offering -- involving either regulated services, non-regulated services, or both -- is implemented and offered to customers.¹¹ All of these

¹¹ BST witness Ena Shaw testified that "[a]ll marketing offerings must be reviewed and approved by upper management within Small Business Services and by the Legal Department before they are offered to customers. Before any such offerings are implemented, reviews and approvals must be obtained from the vice

employees understand that they are required to adhere to this review and approval process, and they are aware that appropriate disciplinary actions, up to and including dismissal, may be taken by BST if this process is not followed in the future. (See Shaw Direct at 2-3).

II. NEITHER THE CLECS NOR THE CONSUMER ADVOCATE AND PROTECTION DIVISION PROVED THEIR ALLEGATIONS THAT THE SELECT BUSINESS PROGRAM OR THE COMBINED OFFERING HAVE HARMED THE VIBRANT LOCAL EXCHANGE SERVICE COMPETITION THAT EXISTS IN TENNESSEE.

Both the Consumer Advocate and Protection Division ("CAPD") and the competitive local exchange companies ("CLECs") participating in this docket allege that the Select Business Program and the combined offering have had an adverse impact on competition in the local exchange market in Tennessee. (See AIN Complaint at ¶6; XO Complaint at ¶6; Page Direct at 5; Brown Direct at 14). The evidence presented during the hearing, however, does not support these allegations. Instead, the evidence presented during the hearing demonstrates that as a result of fierce competition in Tennessee, business customers in general and small business customers in particular have more choices than ever before when it comes to deciding from which provider they will purchase local telecommunications services.

A. Small business customers in Tennessee enjoy the ability to choose from the competitive local exchanges offerings of many different service providers.

president of marketing, the vice president of operations, the chief financial officer, and the chief legal counsel for Small Business Services." (See Shaw Direct at 3-4).

AIN (which is the only CLEC party to present one of its own employees as a witness in these proceedings) markets its services to the smallest of the small business customers -- those with two or three lines each. (Tr. at 30). Mr. Rodney Page, AIN's Vice President of Marketing and Strategic Development, acknowledged that these two- and three-line business customers can purchase the same types of products and services that they are receiving from AIN not only from BST, but from other CLECs as well. (Tr. at 33, 45). In other words, AIN acknowledges that "there are choices that a customer has for those kinds of services [that AIN provides] beyond just BellSouth and AIN in Tennessee," (Tr. at 33), and AIN acknowledges that it competes with companies other than BST in Tennessee. (Tr. at 45).¹²

Exhibit SSD-1 to the rebuttal testimony of BST witness Scott Davis shows that Mr. Page is right -- small businesses in Tennessee can choose from among

¹² This candid testimony from an employee of AIN who actually competes for customers in Tennessee stands in stark contrast to the testimony of Mr. Joseph Gillan, the "consultant economist" that AIN and DeltaCom hired to testify in this proceeding. (Tr. at 54). Mr. Gillan initially said that to characterize an AIN customer as "having a bunch of competitive choices I think *clearly misstates the facts*." (Tr. at 79-80)(emphasis added). After making this bold statement, however, Mr. Gillan admitted that he simply does not know whether an AIN customer could receive similar services from DeltaCom or from Cinergy. (Tr. at 80). In fact, when asked "[s]o when you were talking about misstating the facts, you don't know what the alternatives were for Mr. Page's customers other than BellSouth services," Mr. Gillan could only respond, "[n]ot individually." (Tr. at 81). Later, after admitting that AIN's customers could go back to BST or could go to DeltaCom if DeltaCom offered similar services, Mr. Gillan finally conceded that "[t]o what extent other specific companies could offer a product that the customer wants, I don't really know." (Tr. at 82). As explained below, Mr. Gillan's bold

numerous competitive offerings when purchasing local telecommunications services. This exhibit consists of offers from:

The Electric Power Board of Chattanooga that touts savings of 36% as compared to what the customer pays with BST;

KMC Telecom that touts savings of 29% to 43% (depending on the term commitment chosen by the customer) as compared to what the customer pays with BST;

NewSouth Communications that touts savings of 31.1% to 84.3% (depending on the term commitment chosen by the customer) as compared to what the customer pays with BST;

XO that touts savings of 39% to 44% (depending on the term commitment chosen by the customer) as compared to what the customer pays with BST; and

Birch Telecom that touts savings of 44% to one customer and 71% to another customer as compared to what the customer pays with BST.

(See Davis Rebuttal at 2-3, Exhibit SSD-1).

Among the competitive alternatives that are available to small business customers in Tennessee are package deals offered by CLECs. (Tr. at 88). AIN, for instance, offers its Tennessee small business customers interLATA toll service in addition to local and intraLATA toll service. (Tr. at 31). Additionally, XO's predecessor, Nextlink, offered a package of regulated and unregulated offerings that it marketed as "The Worx." Advertisements for this packaged offering stated

The Worx from Nextlink makes each desk in your office a telecommunications nerve center. Local calls. 1,000 minutes of *nationwide* local calling. Voice-mail. Internet access. Web Hosting.

statements about the CLEC's market share in Tennessee suffered from a similar fatal absence of factual underpinnings.

E-mail. All neatly organized on one phone bill. Simple. Easy. Convenient.

See Hearing Exhibit No. 1 (emphasis added).

During the hearing, AIN/DeltaCom witness Mr. Gillan stated the obvious: there is nothing inherently inappropriate about a public utility like XO, AIN, DeltaCom, or BST offering packages of regulated and unregulated services to customers in the way the TRA allowed XO's predecessor to do by way of "The Worx." (Tr. at 69-71).¹³ In fact, Mr. Gillan stated that even to the extent that he may have a concern with a package that combines regulated and unregulated services, the level of that concern decreases as the number of companies that can provide the regulated services involved in that package increases. (Tr. at 86). In fact, speaking specifically about the prospect of BST offering packages of regulated and unregulated products and services, Mr. Gillan said "you obviously have some regulated products that face a lot of competition. If it's a product that faces a lot of competition and you combine it with an unregulated product, then that concern becomes far less." (Tr. at 71). Packaged offerings like the Worx, therefore, are simply signs of the vibrant competition that exists in the small business market in Tennessee.

¹³ Mr. Gillan also acknowledged that his "rebate" concerns are not tied to the concept of combining regulated and unregulated offerings in a single package. (Tr. at 88-89).

B. CLECs have gained a large share of the market for small business customers in Tennessee.

With offerings such as "The Worx" and discounts of 39%, 44%, and even 84% off BST's rates for similar services, it is no surprise that CLECs have won a very large share of the small business market in those parts of Tennessee in which they have chosen to focus their efforts. AIN, for instance, has focused on the smallest of the small business customers in Tennessee, and it has done very well.¹⁴ As of July 16, 2001, for instance, AIN had approximately 4,200 lines in Tennessee. (Tr. at 29).¹⁵ A mere six weeks later, on August 22, 2001, AIN's access lines in Tennessee had grown to approximately 5,000, (Tr. at 30)¹⁶, and as of February 4, 2002, AIN's access lines in Tennessee had grown to approximately 6,500. (Tr. at 29).

AIN's success in the market segment in which it has chosen to focus its efforts is representative of the success of the CLECs as a whole in Tennessee. As the TRA recently informed the General Assembly, "[o]n June 30, 2001, new market entrants had invested \$489 million in equipment and facilities in Tennessee

¹⁴ Even Mr. Gillan had to concede that AIN could not describe its efforts in Tennessee as a failure. (Tr. at 75-76).

¹⁵ See also, *In Re: Docket to Establish Generic Performance Measurements, Benchmarks, and Enforcement Mechanisms for BellSouth Telecommunications, Inc.*, Docket No. 01-00193, Prefiled Direct Testimony of AIN witness Rodney Page at 3. (Attachment 3). The Hearing Officer took administrative notice of Mr. Page's testimony in the Performance Measurements docket during the February 4, 2002 hearing. (Tr. at 52).

¹⁶ See also, *In Re: Docket to Establish Generic Performance Measurements, Benchmarks, and Enforcement Mechanisms for BellSouth Telecommunications, Inc.*, Docket No. 01-00193, Transcript of August 22, 2001 Hearing at 162 (Attachment

since the passage of [the state Telecommunications Act of 1995 and the federal Telecommunications Act of 1996]." Annual Report of the Tennessee Regulatory Authority for the Period July 1, 2000 to June 30, 2001 at page 36. In that same report, the TRA has informed the General Assembly that "28 competitors serve 335,598 lines in Tennessee, primarily business customers in the State's four (4) largest metropolitan areas."¹⁷ *Id.* This represents "10% of Tennessee's *total* lines open to competition and *28% of the business lines subject to competition.*" *Id.* (emphasis added). As the TRA's Report correctly notes, "Tennesseans are seeing significant competitive activity in the business segments of the local telecommunications markets" (*Id.*).

Consistent with the TRA's observation that CLECs are primarily serving business customers in the state's four largest metropolitan areas, BST witness Don Livingston testified that most of the business lines that are served by CLECs in Tennessee are serving small business customers concentrated in specific geographic regions. (Tr. at 211). In wire centers in the Nashville area, for instance, BST has only about 53% of the lines that serve small business customers, and in wire centers in the Memphis area, BST has only about 51% of

4).

¹⁷ According to end of year 2000 ARMIS data, there were 659,521 BST business lines in Tennessee. The number decreases each month due to competition. For example, ARMIS data shows 680,618 business lines in 1999. BST estimates that as of May 1, 2001, CLECs are currently serving more than 290,000 business lines in Tennessee. Using these figures as examples, the total number of business access lines in BST's territory in Tennessee would be 949,521, and 290,000 CLEC lines would be approximately 30.54 percent of that total.

the lines that serve small business customers. (Tr. at 256-57). As Mr. Livingston explained, "those two cities [and] the whole state of Tennessee is leading the nine-state region as far as the most competitive markets for us." (Tr. at 257). In 2001, BST was losing about one percent of the lines that serve small business customers every month to competitors. (Tr. at 211-12).

3. Neither the CAPD nor the CLECs presented any credible evidence to suggest that either the Select Business Program or the combined offering has harmed competition.

Mr. Livingston's testimony about the CLECs' market share in Tennessee is much more in line with the TRA's finding that CLECs are serving "28% of the business lines subject to competition" on a statewide basis than was the testimony of AIN/DeltaCom witness Mr. Gillan. This should come as no surprise, however, given Mr. Gillan's admissions on cross-examination. For example, although Mr. Gillan stated that AIN "offered service throughout the state," he conceded that he did not know whether AIN was concentrated in any areas within the state because "I've not looked at [AIN's] distribution in Tennessee." (Tr. at 74). Moreover, Mr. Gillan acknowledged that many of his market share guesstimations were based on BST's total number of access lines in Tennessee -- business as well as residential -- because "I don't have [BST's] business line number readily available." (Tr. at 76). He further acknowledged that the line loss numbers he presented in his testimony do not match the data that has been filed in the Tennessee 271 proceedings. (Tr. at 77). He tried to address this obvious discrepancy by stating "I'm talking about small businesses that are in the analog market," (Tr. at 77), but he quickly had to

admit that he does not know how many of BST's customers are small businesses that are in the analog market. (Tr. at 78).

CAPD witness Dr. Stephen Brown claimed that the BellSouth Select Program and the combined offering have "significantly damaged the effort to build a competitive market," (Brown Direct at 14), but he presented no evidence whatsoever to support this allegation. In fact, he acknowledged that aside from what he heard about AIN's Tennessee access lines during the hearing, he simply does not know how many access lines any given CLEC has in the state of Tennessee. (Tr. at 128). He then acknowledged the obvious: given that he has no idea how many access lines any CLEC has in Tennessee, he has no idea what share of any given market any CLEC has in Tennessee. (Tr. at 128-29). Dr. Brown, therefore, simply failed to present any evidence to support his allegations.

The testimony that Dr. Brown heard during the hearing about AIN's Tennessee access lines, however, clearly contradicts his allegations of harm to competition. As discussed in more detail above, AIN has enjoyed more than a 50% increase in its Tennessee access lines from July 16, 2001 until the hearing date of February 4, 2002. As Dr. Brown conceded, BST's combined offering was in effect during a portion of that time frame, and the Select Business Program was in effect during that entire time frame. (Tr. at 128).

Additionally, the combined offering resulted in a total of only 59 business customers in Tennessee leaving a CLEC and purchasing service from BST.¹⁸ Even under the unrealistic assumption that each and every one of these 59 customers were customers of AIN when they accepted the offering, the number of access lines AIN would have lost as a result of the combined offering would pale in comparison to the approximately 800 access lines AIN gained between July 16, 2001 and August 22, 2001 or in the nearly 1500 access lines AIN gained between August 22, 2001 and February 4, 2002.¹⁹ Again, the facts presented during the hearing simply do not support Dr. Brown's allegations of harm to competition.

D. In addition to directly benefiting the customers who accepted the offer, the combined offering indirectly benefited customers who did not accept the offer.

Mr. Page testified that AIN's board was concerned about a 40% reduction off of BST's tariffed price that was presented by the combined offering, and he stated that "our business plan was questioned to some degree." (Page Direct at 5; Tr. at 27). He went on to candidly admit that "because we feel our plan could be threatened in the future, frankly, we took these measures, and we want it stopped." (Tr. at 27). When asked on cross-examination whether it would be fair to say that AIN's desire is to raise its rates over time, Mr. Page responded, "[n]o, that would not be fair." (Tr. at 47).

¹⁸ As noted above, 4 of the 63 small business customers who accepted the combined offering were customers of BST when they accepted it.

¹⁹ In light of AIN's testimony that its customers average two or three lines each, 59 of its customers would represent approximately 118 (59 x 2) to 177 (59

But that is exactly what Mr. Page told the Authority when he testified in the performance measurements docket just six months ago. In fact, on cross-examination, Mr. Page read into the record in this proceeding the following testimony he gave before this Authority on August 22, 2001:

Well, I would say that our desire over time is to raise prices, frankly, because we hope there is more perceived value in doing business with us, and I would presume BellSouth or any other company would want to do that. Whether one could or not, I don't know.

(Tr. at 49).²⁰ Mr. Page then acknowledged that "if BellSouth were to lower the rates that it's charging its customers, all other things being equal, that's going to make it more difficult for AIN to raise the rates it's charging to customers." (Tr. at 50). Thus, even assuming that AIN's characterization of the combined offering as involving reductions to regulated rates were correct (and, as explained below, it is now), the fact remains that in addition to directly benefiting those customers who accepted the offer, the combined offering indirectly benefited end users who are being served by CLECs by discouraging those CLECs from increasing their rates. That is exactly what competition is supposed to do.

Finally, although AIN was concerned with the impact that the combined offering might have on its business plan and, therefore, took measures to have it stopped, Mr. Page acknowledges that AIN competes with companies other than

x 3) access lines.

²⁰ See also, *In Re: Docket to Establish Generic Performance Measurements, Benchmarks, and Enforcement Mechanisms for BellSouth Telecommunications, Inc.*, Docket No. 01-00193, Transcript of August 22, 2001 Hearing at 154-155. (Attachment 5).

BST in Tennessee. (Tr. at 45). He also acknowledges that one or more of these other companies offers discounts in the range of 40% off BST's rates. (Tr. at 46-47). Thus, even if there had never been a Select Business Program or the combined offering, AIN still would have to compete with companies that were offering 40% discounts off BST's rates. (Tr. at 47).

III. THE SELECT BUSINESS PROGRAM IS AN EXAMPLE OF THE UNREGULATED OPERATIONS OF BELL SOUTH PRICING ITS UNREGULATED PRODUCTS AND SERVICES AS IT DEEMS APPROPRIATE.

An unregulated company can price its products and services at what the market will bear, subject only to economic laws such as those prohibiting predatory pricing. Even AIN/DeltaCom witness Dr. Gillan agrees this is true. (Tr. at 58). As a matter of law, the same thing is true of the unregulated operations of a public utility like BST.

A. Under Tennessee law, the regulatory requirements that apply to the regulated operations of a public utility like BST do not apply to the utility's unregulated operations.

For more than a century, courts in this country have recognized that the common law and statutory obligations of a public utility apply only to the extent that it is providing a regulated public service. Those obligations simply do not apply to the extent that a public utility engages in other, unregulated business. More than 125 years ago, for instance, the New York Court of Appeals stated that:

The carrier . . . may carry on, in connection with his business of carrier, any other business, and may use his property in any way he may choose to promote his interests, not inconsistent with the duty he owes to passengers. The vessel or vehicle which he uses is his own, and except to the extent to which he has devoted it to public use, by

the business in which he has engaged, he may manage and control it for his own profit and advantage, to the exclusion of all other persons.

* * *

The passenger has the right to be carried and to enjoy equal privileges with others, or at least to be exempt from unjust or offensive discrimination in favor of other passengers. But he has no right to demand that in matters not falling within the contract of carriage, the carrier shall surrender in any respect, rights incident to his ownership of his property.

Barney v. Oyster Bay and Huntington Steamboat Co., 67 N.Y. 301, 302-03 (Ct. App. N.Y. 1876). *Accord Norfolk & Western Ry. Co. v. Old Dominion Baggage Co.*, 37 S.E. 784 (Va. 1901) (relying on various decisions by the common law courts of England, the Court rejected discrimination challenges to a railroad's decision to grant a single company the right to enter the railroad's station to solicit incoming baggage).

Tennessee decisions embrace these same principles. In *Memphis News Pub. Co. v. Southern Ry. Co.*, 75 S.W. 941, 946 (Tenn. 1903), for instance, the Supreme Court of Tennessee stated that

It has been held that a common carrier of passengers may establish in his car or vessel an agency for the delivery of passengers' baggage, and may exclude all other persons from entering upon it for the purpose of soliciting or receiving orders therefor. It has been also held that a railroad corporation may exclude from its right of way one party who comes to sell lunches to its passengers and admit another to this privilege, if it pleases and that a steamship corporation and a railroad may equally give preferential privilege to certain hackmen to solicit passengers on their property and exclude others.

The Court then explained that these decisions rest on the rule that

save as to duties which he owes to the public, a common carrier has as complete dominion over its property, whatever it may be, as does every other owner, and may therefore exclude from or admit to it, at its will, particular persons. In other words, *an inhibition upon preferential indulgences extends only to those services which inhere in or pertain to the office of a common carrier, and beyond these he is entitled to the absolute control of his own, and that in none of these matters covered by these cases does he owe anything to the public.*

Memphis News Pub. Co. v. Southern Ry. Co., 75 S.W. 941, 946 (Tenn. 1903)(emphasis added).

The Tennessee Court of Appeals reaffirmed these principles in 1962 when it noted that "there is a vast difference between a public service corporation acting in its capacity as a public utility and acting outside of that capacity by contract made limiting liability for its negligence or mistakes in that type of service." *Smith v. Southern Bell Tel. & Tel. Co.*, 364 S.W.2d 952, 956 (Ct. App. Tenn. 1962). More specifically, the *Smith* Court held that "the principle which enables courts to strike down and condemn clauses affecting the performance by the company of its functions as a public utility is limited to the area in which the public services are rendered and has *no application whatever to the domain in which the public utility may freely contract in its private capacity.*" *Smith v. Southern Bell Tel. & Tel. Co.*, 364 S.W.2d 952, 957 (Ct. App. Tenn. 1962)(emphasis added).

- B. The Select Business Program is an example of the unregulated operations of BellSouth pricing unregulated products and services as it deems appropriate.**

These decisions apply with full force to the Select Business Program. The program is an example of the unregulated operations of BellSouth using a legitimate

and common practice -- a customer loyalty program -- and pricing unregulated products and services as it deems appropriate, just like unregulated companies do, and just like BST's competitors do. This becomes obvious in light of the uncontroverted testimony of BST's accounting witness, Mr. Thomas Lohman.

Mr. Lohman explained that a BST customer must purchase at least one non-regulated product or service to participate in the Select Business Program. The customer is billed the full rate for the non-regulated service each month, and the revenue is recorded as non-regulated. When a customer earns points that are charged to BST, the total cost of those points (earned on both regulated and non-regulated purchases) is charged (debited) to non-regulated revenues. Thus, BST's entire cost of the program points is borne by the non-regulated lines of business, and there is neither a reduction of the regulated revenues nor a discount to tariff rates. (See Lohman Direct at 4). As Mr. Lohman summarized:

all regulated services are charged to the customer at the appropriate tariffed rate, and the revenues (at the tariffed rates) are recorded and reported in financial reports accordingly. The cost of the points is charged to non-regulated revenues, thus there is no discount or reduction of regulated revenues under the offering that is described in the complaints filed by XO and AIN.

(Lohman Direct at 5).²¹

In other words, BST bills, collects, and keeps the entire tariffed rates for the regulated services that Select members purchase -- none of those rates are handed

²¹ Mr. Lohman also explained that in addition to the costs of the points, the administrative costs of the Select Business Program also are being borne by the non-regulated operations of BellSouth. (Lohman Direct at 6-7). As stated, BST

back to the customer in the way of points or otherwise (regardless of whether points are redeemed for a bill credit, for unregulated products or services, or for a check). In contrast, BellSouth bills its Select members the full price for the unregulated products and services they purchase, but its unregulated operations give back some of the price²² of those unregulated products and services in the form of points that can be redeemed for cash or for unregulated products or services. As the cases discussed in Section III.A of this brief show, it is just as appropriate for the unregulated operations of a public utility like BST to do this as it is for an airline to run a frequent flier program or for a shoe store to run a "buy one pair, get a second pair for half price" sale.

IV. THE SELECT BUSINESS PROGRAM DOES NOT PROVIDE A REBATE OR A REDUCTION OFF TARIFFED RATES FOR REGULATED SERVICES.

During the hearing, the CLECs argued that the Select Business Program operates as a rebate off tariffed services, which they defined as "[a] rate not taken out in advance of payment but *handed back* to the payer after he has paid the full stipulated sum [for tariffed services]." (Tr. at 11)(emphasis added). The CAPD's

ceased marketing the combined offer.

²² Mr. Lohman explained that the prices BellSouth's unregulated operations give back to customers in the form of points are very small in relation to the total prices it collects for its unregulated products and services. For the year 2000, for instance, the total amount of contra-revenue charged to BST's non-regulated revenues in Tennessee as a result of these Select programs was approximately one percent (1%) of the total amount of non-regulated revenue for BST in Tennessee. For the year 2001, the total amount of contra-revenue charged to BST's non-regulated revenues in Tennessee as a result of these Select programs was approximately one and one-half percent (1.5%) of the total amount of non-regulated revenue for BST in Tennessee. (See Lohman Direct at 7-8).

attorney argued that the Select Business Program operates as a rebate that "results in members *paying less for regulated service* than nonmembers." (Tr. at 14)(emphasis added). These allegations are flatly refuted by the evidence presented by BST.

First, Mr. Lohman's uncontroverted testimony makes it clear that none of the regulated rates BST collects for tariffed services are "handed back" to the customer as alleged by the CLECs. Moreover, Dr. Banerjee explained that BST's accounting for transactions involved in the Select Business Program makes it clear that "BST is selling its regulated services -- whether or not a customer receives a Select Business Program discount -- through precisely the tariff procedure that has been established for those services. Thus, there is no basis for any claim that a rebate is being provided for the purchase of BST's regulated services." (Banerjee Rebuttal at 3-4).²³

²³ This is obviously true at the aggregate level. In light of the modifications to the Select Business Program discussed in Section I.A.2 of this brief, this is also true at the individual customer level. BSSI has enhanced its systems to ensure that the value of points redeemed by a customer does not exceed the amount of the customer's aggregate non-regulated spending since joining the program less the value of points that customer has already redeemed. (See Tice Direct at 10; Tr. at 140-41). Assume, for example, that a customer has \$100 worth of points but that it has purchased only \$50 worth of unregulated services. That customer can only redeem \$50 worth of points. If the customer spends \$10 on unregulated services the following month, the customer is now able to redeem an additional \$10 worth of points. Thus even at the individual customer level, none of the tariffed rates that have been collected from the customer are "handed back" to the customer in the form of redemptions for points. Moreover, any customer that already has redeemed points, the value of which exceeds that customer's accumulated unregulated spending, will be unable to redeem any more points in the future until it satisfies these requirements.

This is most clearly demonstrated by the simple example Dr. Banerjee used in his testimony:

It is fairly common to see shoe retailers making "buy one pair at full price, get the second pair at half price" offers. The customer may well believe that he or she bought two pairs of shoes and got a 25 percent discount on each pair. However, in truth, that customer could not buy just a single pair of shoes for 75 percent of the posted price. The first pair has to be bought at full price in order for the customer to be eligible for the second pair at half price. Anyone who has ever participated in such a sale and looked at the sales receipt would see the sale rung up just as I have described it.

(Banerjee Rebuttal at 5). As Dr. Banerjee explained,

That is analogous to the manner in which the BellSouth Select program is being run. The end user has to purchase regulated and unregulated services and, more importantly, has to pay the full tariffed price for the regulated services in order to obtain a discount -- either directly or through the use of redeemable points -- for the unregulated service.

(Banerjee Rebuttal at 3-4). As Dr. Banerjee stated, "[t]he bottom line, therefore, is that as long as BST properly accounts for the so-called 'discounts' on its books of account for unregulated services, there can be no actual rebate or discount on the tariffed regulated services." (Banerjee Rebuttal at 5).

Even AIN acknowledges that illegal rebate concerns are significantly diminished when both regulated and unregulated services are involved in an offering. On cross examination, Mr. Page was asked to consider a hypothetical offering in which a CLEC provided a 75% discount off the price of paging service to those customers who also purchased local service from the CLEC. (Tr. at 41-42). Mr. Page stated that such an offer would not raise any illegal rebate concerns in his

mind. (*Id.*). Although he stated that he would have "more concern" if an incumbent made the same offer, he clearly acknowledged that such concerns were "business concerns more than illegal rebate concerns" (*Id.*) He also acknowledged that he was not suggesting that such an offering from an incumbent would be an illegal rebate. (*Id.* at 41-42.).

V. NEITHER THE SELECT BUSINESS PROGRAM NOR THE COMBINED OFFERING UNJUSTLY DISCRIMINATES BETWEEN SIMILARLY-SITUATED CUSTOMERS.

Even if the Select Business Program operated as a rebate with regard to regulated services (which it clearly does not), the CLECs and the CAPD would have to prove more than that in order to establish a violation of section 65-4-122. That statute reads, in pertinent part:

If any common carrier or public service company, directly or indirectly, by . . . rebate . . . or other device, charges, demands, collects, or receives from any person a greater or less compensation for any service within this state than it charges, demands, collects, or receives from any other person for service of a like kind *under substantially like circumstances and conditions*, . . . such common carrier or other public service company commits *unjust discrimination*

T.C.A. §65-4-122(a)(emphasis added). The evidence presented at the hearing shows that the combined offering was and the Select Business Program was and still is available to all BST customers who meet the eligibility requirements of the respective offerings.²⁴ The CLECs and the CAPD, therefore, have failed to prove any unjust discrimination on the part of BST.

²⁴ Establishing volume and term eligibility requirements for offerings and making the offerings available only to those who meet those eligibility requirements is a

A. The combined offering was available to all similarly-situated customers.

BST witness Don Livingston testified that the combined offering was available to any BST customer that signed a 36-month term election under the 2001 Key Program and who enrolled in the Select Business Program. (Livingston Direct at 5). This is consistent with Ms. Robin Porter's deposition testimony that she offered the combined offering to customers that were with BST at the time. (Tr. of Deposition of Robin Porter at 33). This is also consistent with the fact that four of the sixty-three (63) Tennessee customers that accepted that combined offering were receiving service from BST when they accepted the offer. (See Livingston Direct at 5; Tr. at 244; BST's Response to Staff's First Data Request, Item No. 6, Attachment 6.2) (copy attached as Attachment 2). Clearly, BST made the offering available to similarly-situated customers on a nondiscriminatory basis.

B. The Select Business Program has been and continues to be available to all similarly-situated customers.

BST witness Don Livingston testified that all versions of the Select program have been available to all customers who meet the eligibility requirements. (Tr. at 210). In fact, several methods have been used to inform eligible customers of the program, including direct mailings, contacts by BAPCO representatives, in-bound

time-honored and perfectly acceptable practice. In fact, AIN/DeltaCom witness Mr. Gillan acknowledged that volume and term contracts are authorized practices in Tennessee, and he acknowledged that volume and term requirements are not inherently discriminatory. He also acknowledged that if a customer did not meet the criteria for the Select program because it did not have \$100 worth of BST

calls,²⁵ out-bound calls, and a web site (see www.bellsouthselectbusiness.com). (Livingston Direct at 8; Tice Direct at 6-7). Although AIN/DeltaCom witness Mr. Gillan made unsubstantiated and conclusory allegations that certain aspects of the Select Business Program could be discriminatory, he conceded that he is not aware of any customer that wished to participate in the Select Business Program and that was eligible to do so but that was denied the opportunity to participate. (Tr. at 61).

CAPD witness Dr. Brown also suggested that BST does not make the Select Business Program available to some customers who are eligible for the program, but that suggestion clearly was based on a single excerpt from the deposition of Don Livingston. (Brown Direct at 10). On cross examination, however, Dr. Brown acknowledged that during his deposition, Mr. Livingston also stated that "[w]e look in our database and see which customers are eligible for the program, and then we try to invite them to the program. It could be a direct mail piece, or the sales force could mention it to the customer." (Tr. at 124). When faced with this portion of Mr. Livingston's deposition, Dr. Brown claimed that it was "a contradiction, according to what Mr. Tice said, who said that we've had a rolling criteria." (*Id.*).

services, that customer would be like a customer that did not meet the volume requirement in a volume and term contract. (Tr. at 61-62).

²⁵ A notation is placed on BellSouth's record of all customers that are eligible for the Select Business Program, and when an eligible customer places a call to a BST service representative, that representative typically invites the customer to join the Select program. (Tr. at 160-61; 195).

The fact that the eligibility requirements for various versions of the Select program have changed over time, however, does not contradict the fact that each version of the program was available to all customers that met the eligibility requirements that were in effect at any given time. Moreover, nothing in Mr. Tice's deposition testimony suggests that the Select program was not available to any customer that met the program's eligibility requirements. Finally, Dr. Brown stated that he did not review the deposition testimony of Ms. Robin Porter. (Tr. at 124). Had he done so, he would have discovered that Ms. Porter testified that BST offers the Select program to any customer that meets the eligibility requirements. (Porter Depo. at 9).

C. The use of Select service managers is not discriminatory.

Service Managers are available to provide assistance to any customer regarding certain repair issues. If a repair issue is not resolved by the Repair Center within the time frame specified by the Repair Center, and if the issue remains unresolved after it has been escalated, a service manager can assist any customer in resolving the issue. A Service Manager takes ownership of the situation until it is resolved, provides status reports to the customer, and is "on call" at all times until the issue is resolved. Some of the Service Managers are designated to assist customers that have enrolled in the Select Business Program, and they are called Select Service Managers. They do the same things for customers that have enrolled in the Select Business Program as the other Service Managers do for

customers that have not enrolled in the Select Business Program. (Livingston Direct at 7).

In fact, BST witness Don Livingston explained that the workload of the Select Service Manager that handles Tennessee accounts is equal to the workload of the Service Manager that handles non-Select Tennessee accounts. (Tr. at 234). This stands to reason, because as Mr. Livingston explained, small business customers that are enrolled in the Select program tend to be bigger and have more complex network problems than small business customers that are not enrolled in the program. Accordingly, more repair issues regarding Select customers require escalations, and these escalations typically take more time to resolve than escalations from small business customers that are not enrolled in the Select program. (See Tr. at 234).

AIN's claims that "BellSouth Select offered certain customers better service than others," (Page Direct at 5), are simply unsubstantiated. AIN based its claims on a document (attached to Mr. Page's testimony) that sets out the three steps a Select customer must follow in order to receive assistance from a Select Service Manager. Step one is to call the repair center. (Tr. at 43). Mr. Page acknowledges that any BST business customer that has a repair problem can call the same repair center. (*Id.*). Step two is that if the problem has not been handled by the repair center within the specified period of time, the Select customer can request a first level escalation. (*Id.*). Mr. Page acknowledges that any business customer that does not believe the repair center has handled a problem in a specified time period

can request a first level escalation. (Tr. at 43-44). Step 3 is that if the Select customer is not satisfied after allowing time for the first level escalation to be handled, the Select customer can contact the Select Service Manager. (Tr. at 44). Mr. Page acknowledges that if a non-Select business customer has called the repair center and then gone through a first level escalation but is still dissatisfied, that non-Select business customer can also call a Service Manager to assist in resolving the problem. (*Id.*). Mr. Page also concedes that he has no reason to believe that the Service Manager that handles non-Select business customers does anything differently than the Service Manager that handles Select business customers. (Tr. at 45). Similarly, AIN/DeltaCom witness Mr. Gillan concedes that he has no knowledge of anything that a Select Service Manager would do that a non-Select Service Manager would not do. (Tr. at 63-64).

Mr. Page also claimed that the "available to certain platinum level members" language in the document attached to his testimony suggests that only "some segment of platinum level members" had access to the Select Service Manager. (Tr. at 52-53). Mr. Tice, however, explained that BST was in the process of putting Select Service Managers in place when this document was developed and that this language meant that not all Select Service Managers were in place yet. (Tr. at 167). Mr. Tice went on to explain that "I think there's only one Select Service Manager in Tennessee, so I would think when that Service Manager was put in place, then all Tennessee Select customers would have that Service Manager available." (Tr. at 167-68).

VI. THE CONSUMER ADVOCATE AND PROTECTION DIVISION'S ATTACKS ON THE 2001 KEY PROGRAM ARE WITHOUT MERIT.

CAPD witness Dr. Brown launched a series of attacks on BST's 2001 Key Program. Dr. Brown, for instance, claimed that it is inappropriate for BST to offer the 2001 Key Program only to customers that are located in designated areas in the state of Tennessee and that meet certain revenue thresholds. (Tr. at 120). Dr. Brown, however, acknowledges that these location and revenue requirements are set forth in BST's tariff describing the program. (Tr. at 120). Dr. Brown also acknowledges that BST filed the 2001 Key Program tariff with the TRA, that the CAPD did not challenge the tariff, and that the TRA has approved the tariff. (Tr. at 120-22).²⁶

Dr. Brown also takes issue with the termination charge provisions set forth in BST's 2001 Key Business Program tariff. (Tr. at 125-26). He concedes, however, that these provisions are consistent with the termination charge provisions set forth in Rule 1220-4-2-.59(4) that the Authority recently adopted. (Tr. at 126). He also concedes that the CAPD *recommended* that very rule (which contains the very same termination charge provisions that he is attacking in this docket) to the TRA. (Tr. at 127).²⁷

²⁶ As discussed during the hearing, SECCA filed a Petition asking the TRA to deny this tariff for various reasons, and the certificate of service indicates that the CAPD was served with a copy of that Petition. (See Attachment 6).

²⁷ Attachment 7 to this brief is a copy of the CAPD's written comments on the proposed rule. These comments state that "[t]he lone change the Attorney General asks the Authority to consider is making the new rule apply retroactively rather than prospectively," (p. 4). These comments also state that "[c]onsistent with its

Dr. Brown's concerns with the 2001 Key Program tariff are best summarized by his statement that "[i]n my opinion, features of the Key contracts mirror the CSAs we reviewed in docket 98-00559." (Brown Direct at 14-15). As Dr. Brown acknowledged, however, the TRA approved the two contracts at issue in the contested case proceedings in docket 98-00559. (Tr. at 129-30). Moreover, the TRA did not strike down any of the contracts that the CAD reviewed in the generic portion of that proceeding. (*See* Tr. at 130).²⁸

For each of these reasons, the Hearing Officer should reject the CAPD's attacks on the 2001 Key Program.

VII. THE CLECS AND THE CONSUMER ADVOCATE AND PROTECTION DIVISION HAVE REQUESTED REMEDIES THAT THE HEARING OFFICER IS NOT AUTHORIZED TO GRANT AND TO WHICH THEY ARE NOT ENTITLED.

In the Order issued on November 6, 2001, the Hearing Officer carefully reviewed both of the Complaints that were filed in this docket, as well as AIN's "Motion to Open a Show Cause Proceeding," and ruled that "the actual remedy available as a result of the filing of the complaints and the Motion to Open a Show Cause Proceeding must be the opening of an investigation." *Order* at 11. *See also*,

comments, the Attorney General recommends the new rule to the Authority." (p. 6).

²⁸ Dr. Brown also suggested that the Hearing Officer should adjust the 16% resale discount rate in this docket. (Tr. at 119). This suggestion ignores the fact that the TRA did not delegate to the Hearing Officer any authority to make such an adjustment in this docket. Moreover, Dr. Brown concedes that the Hearing Officer would have to consider cost studies in order to make such an adjustment, and he acknowledges that the CAPD has introduced no cost studies into the record of this docket. (Tr. at 119-20). Nor has any other party introduced cost studies into the record. The Hearing Officer, therefore, should reject Dr. Brown's suggestion of

Order at 14. The relief requested in the testimony of the CLECs and the CAPD clearly, and inappropriately, exceeds the remedy outlined in this Order.

If the Hearing Officer decides to order the remedy of opening an investigation, and if a show cause order indicating actions the Authority is contemplating taking against BST is issued in accordance with section 65-2-106, BST reserves the right to fully address each contemplated action in accordance with the procedures set forth in Title 65 of the Code. For the purposes of the instant proceeding, however, BST will briefly address certain aspects of the relief requested by the CAPD and the CLECs.

- A. If the TRA determines that an illegal rebate has been given, the United States Supreme Court's *Maislin* decision makes it clear that the TRA is required to order BST to collect the full tariffed rate from the customers that received the rebate and not give additional illegal rebates to even more customers.**

AIN/DeltaCom witness Mr. Gillan characterizes the remedy set forth by the Supreme Court of the United States in its *Maislin* decision as the "standard" remedy for a rebate. (Gillan Direct at 8). He then goes on to suggest various alternative remedies that he thinks the Authority should impose instead. (*Id.* at 8-10). This suggestion, however, is improper, because it ignores the plain language of the *Maislin* decision.

In *Maislin Industries v. Primary Steel, Inc.*, 497 U.S. 116 (1990), the Supreme Court of the United States addressed an illegal rebate -- a carrier entered into a special contract for off-tariff rates with a customer and did not have the

adjusting the resale discount rate in this docket.

special contract approved by the Interstate Commerce Commission ("ICC") as it should have. In addressing this rebate, the Supreme Court stated that "the statute require[s] the filing and publishing of tariffs specifying the rates adopted by the carrier, and ma[kes] these the *legal* rates, that is, those which must be charged to all shippers alike." *Id.* at 126 (emphasis in original). The Court went on to say that "[b]y refusing to order collection of the filed rate solely because the parties had agreed to a lower rate, the ICC has permitted the very price discrimination that the Act by its terms seeks to prevent." *Id.* at 81. The Court concluded that:

[The Act] has provided for the establishing of one rate, to be filed as provided, subject to change as provided, *and that rate to be while in force the only legal rate*. Any other construction of the statute opens the door to the possibility of the very abuses of unequal rates which it was the design of the statute to prohibit and punish.

Congress has not diverged from this interpretation and we decline to revisit it ourselves.

Id. at 130-31 (1990)(emphasis added).

In opposing this remedy, the ICC argued that ordering the carrier to collect the full tariffed rate from the party that received the benefit of the untariffed rates would result in the carrier receiving "a windfall *i.e.*, the higher filed rate" *Id.* at 131. The Court succinctly responded to this argument as follows:

But §10761 *requires* the carrier to collect the filed rate, and we have never accepted the argument that such "equities" are relevant to the application of §10761. Indeed, strict adherence to the filed rate has never been justified on the ground that the carrier is equitably entitled to that rate, but rather that such adherence, despite its harsh consequences in some cases, is necessary to enforcement of the Act.

Id. at 131-32 (emphasis in original).

For all of the reasons set forth above, the Select Business Program simply is not a rebate off the tariffed rates for regulated services. If the TRA were to find that it is such a rebate, however, it would have no authority to do what the CLECs are suggesting -- that is, compound the issue by requiring BST to provide off-tariffed rates to other customers, including those that did not even attempt to participate in the program. Instead, the United States Supreme Court has made it abundantly clear that the remedy it established in the *Maislin* decision is the one and only remedy for a rebate.

B. The TRA has no statutory authority to impose fines for rebates.

State statutes provide that "[a]n action may be brought by any person against any person or corporation, owning or operating such public service company in Tennessee, for the violation of this section [prohibiting rebates off tariffed rates for regulated services], *before any court having jurisdiction to try the same.*" T.C.A. §65-4-122(e) (emphasis added). The TRA "is an administrative agency exercising co-mingled legislative, executive, and judicial functions,"²⁹ and both the statutes governing the TRA³⁰ and the Uniform Administrative Procedures Act³¹ clearly distinguish between the TRA and a court. The TRA, therefore, is not a

²⁹ *Tennessee Cable Telev. Ass'n v. Public Serv. Comm'n*, 844 S.W.2d 151, 158 (Tenn. Ct. App. 1992).

³⁰ *See, e.g.*, T.C.A. §§65-2-109(a) ("The authority shall not be bound by the rules of evidence applicable in a court").

³¹ *See, e.g.*, T.C.A. §§4-5-221(c) (setting forth the conditions under which the text of the rules appearing in the administrative code may be "used in all courts, agencies, departments, offices of and proceeding in the state of Tennessee"); 4-5-

court, and it has no jurisdiction to hear any action alleging violations of section 65-4-122. Moreover, the TRA has no statutory power to impose a fine upon a public utility for having charged a rate that it determines is discriminatory or unduly preferential.³²

C. The TRA has no statutory authority to require BST to make the Select Business Program available for resale.

To the extent that the CLECs argue that the Select Business Program is subject to resale, they are simply mistaken. As explained above, the Select Business Program is the unregulated operations of BellSouth pricing its unregulated products and services as it deems appropriate. Just as discount plans for paging services, wireless services, web hosting services, and internet access services are not subject to the resale provisions of the federal Telecommunications Act of 1996, the Select Business Program is not subject to those resale provisions.

CONCLUSION

223(b) (an agency's declaratory order is binding between the agency and the parties "unless altered or set aside by the agency or a court in a proper proceeding").

³² While section 65-4-120 generally allows the TRA to impose penalties of \$50.00 per day for violation of "any lawful order, judgment, finding, rule or requirement of the authority," section 65-4-122 specifically addresses actions alleging extortion or unjust discrimination, and it provides that such actions are to be brought "before any court having jurisdiction to try the same." Under Tennessee law, a specific statutory provision will control over a more general statutory provision. *See Washington v. Robertson County*, 29 S.W.2d 466, 475 (Tenn. 2000). The specific statutory provisions of section 65-4-122, therefore, control over the general statutory provisions of section 65-4-120, and the TRA has no authority to impose fines for discrimination or extortion. If this were not the case, the Authority could enact a rule that says exactly what section 65-4-122 says, impose fines for a violation of that rule, and circumvent the statutory requirement that actions seeking such fines be brought before a court.

The combined offering was the result of a mistake, and BST has taken quick and appropriate action to address the mistake and to ensure that similar mistakes do not happen in the future. The Select Business Program is an example of the unregulated operations of BellSouth using a legitimate and common practice -- a customer loyalty program -- and pricing unregulated products and services as it deems appropriate. It is just as appropriate for the unregulated operations of a public utility like BST to do this as it is for an airline to run a frequent flier program or for a shoe store to run a "buy one pair, get a second pair for half price" sale. The Hearing Officer, therefore, should dismiss the Complaints filed by Access Integrated Networks, Inc. ("AIN") and XO Tennessee, Inc. ("XO") with prejudice and deny AIN's Motion to Open a Show Cause Proceeding.

Respectfully submitted,

BELLSOUTH TELECOMMUNICATIONS, INC.

By: 

Guy M. Hicks
333 Commerce Street, Suite 2101
Nashville, Tennessee 37201-3300
(615) 214-6301

Patrick W. Turner
675 W. Peachtree St., NE, Suite 4300
Atlanta, Georgia 30375

APPENDIX A

DESCRIPTION OF PAST SELECT BUSINESS PROGRAMS

The original Select Business Program was launched in five trial markets (none of which were in Tennessee) in March of 1999, and it was available to: (1) BST small business customers with a monthly BST spend of at least \$500 (including at least one non-regulated service); and (2) BellSouth Advertising and Publishing Corp. ("BAPCO") major account customers.³³ Participants in the program earned one point per dollar of BST spend, and they earned one point per dollar of BAPCO spend. Late in 1999, this program was expanded to include Tennessee markets. Points originally were redeemable for credit on the BellSouth bill, and later points also were redeemable for items such as prepaid phone cards and phone equipment. In June 2000, all participants in this program were upgraded to the Platinum program described below. Accordingly, no customer is participating in the original Select Business program today.

The Gold program was launched in September 1999, and it was available to small business customers with a monthly BST spend of at least \$250 (including at least one non-regulated service). Participants earned one point per dollar of BST spend, and they did not earn points for BAPCO spend. Points originally were redeemable for credit on the BellSouth bill, and redemption options later were

³³ Unless otherwise noted, the information set out in this Appendix is based on BST's response to XO's 2nd Data Request, Item No. 6. During the hearing, BST witness Richard Tice testified that this response accurately summarizes the program as it has evolved over time. (Tr. at 144; 169-70).

expanded to include items such as prepaid phone cards and phone equipment. In June 2000, all participants in this program were upgraded to the Platinum program described below. Accordingly, no customer is participating in the Gold program today.

The Silver program was launched in June 2000, and it was available to small business customers with a monthly BST spend of \$100 to \$250 (including at least one non-regulated service). Participants in the Silver program did not earn points based on their monthly regulated or non-regulated spend. (See Tr. at 153; 169; 204-05). Instead, participants received 500 points when they enrolled in the program, and they received a designated number of additional points when they purchased specified products or services. Redemption options were the same as those specified in the Gold program, and participants that increased their monthly BST spend to \$250 or more were automatically upgraded to the Platinum program discussed below. Additionally, when the eligibility requirements for the Platinum program were reduced to \$100 in September 2001, all existing participants in the Silver program were automatically upgraded to the Platinum program. Accordingly, no customer is participating in the Silver program today.

The Platinum program was launched in June 2000, and it originally was available to small business customers with a monthly BST spend of at least \$250 (including at least one non-regulated service). Participants earned one point per dollar of BST spend and one point for every three dollars of BAPCO spend. When the Platinum program was launched, existing Gold participants automatically were

upgraded to the Platinum program. Additionally, Silver members that increased their monthly BST spend to \$250 or more automatically were upgraded to the Platinum program. The Platinum program was modified in September 2001, when the monthly spending requirement was reduced to \$100. Upon implementation of this change, all existing Silver participants were automatically upgraded to the Platinum program. Additionally, redemption options were expanded to include several business products such as Palm Pilots and other items. The Platinum program, which is described in more detail in the foregoing brief, is the only version of the Select Business Program that is in effect today.

ATTACHMENT 1

Docket 01-00868
January 25, 2002
Exhibit DL-1

BELLSOUTH
TELECOMMUNICATIONS, INC.
TENNESSEE
ISSUED: May 25, 2001
BY: President - Tennessee
Nashville, Tennessee

GENERAL SUBSCRIBER SERVICES TARIFF

Original Page 84

EFFECTIVE: June 26, 2001

A13. MISCELLANEOUS SERVICE ARRANGEMENTS**A13.90 Business Programs (Cont'd)****A13.90.6 2001 Key Business Discount Program****A. Rules and Regulations**

Beginning June 26, 2001, and continuing until June 25, 2002, qualifying business customers with locations in specific wire centers may enroll in this Program, which provides discounts on their billed BellSouth revenue as described below, by signing an eighteen month or three-year term contract.

1. In order to qualify for the 2001 Key Business Discount Program, new and existing BellSouth business customers with locations in specific wire centers listed following, must meet these requirements:

- a. Participants must have monthly total billed BellSouth revenue of between \$100 and \$3000 at one location in a listed wire center per billed telephone number or Club bill. All other locations billed to the same telephone number or Club bill may also participate.
- b. Participants may not have Analog Private Line service.
- c. Multi location customers with BellSouth® Centrex, MultiServ® service, ESSX® service, or Digital ESSX service may participate so long as at least one location meets the eligibility requirement in a. preceeding. All other locations may participate as long as they are billed under the same account.

2. Eligible Wire Centers are: All wire centers in Rate Groups 4 and 5, Clarksville (Main) and Columbia (Main).

GENERAL SUBSCRIBER SERVICES TARIFF

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BELLSOUTH
TELECOMMUNICATIONS, INC.
TENNESSEE
ISSUED: May 25, 2001
BY: President - Tennessee
Nashville, Tennessee

EFFECTIVE: June 26, 2001

A13. MISCELLANEOUS SERVICE ARRANGEMENTS

A13.90 Business Programs (Cont'd)

A13.90.6 2001 Key Business Discount Program (cont'd)

A. Rules and Regulations (cont'd)

2. Qualifying Program participants must sign a term contract of eighteen months or three years to receive the discounts that are detailed in B. following, Discount Schedule. (N)
3. Base and Hunting discounts will be applied to billing for services in the Tennessee General Subscriber Services Tariff and the Tennessee Private Line Services Tariff. (N)
4. Discounts are based on end-user monthly total billed BellSouth revenue at Tennessee locations in specific wire centers excluding:
 - Unregulated charges, taxes, late payment charges, charges billed pursuant to federal or state access service tariffs, charges collected on behalf of municipalities (including, but not limited to services for 911 service and dual party relay services), and charges for services provided by other companies. (N)
5. To participate in this Program, qualifying customers must sign an eighteenth month or three-year term contract between June 26, 2001, and June 25, 2002. Following this period, no subscribers may enroll in this Program. This Program is available for resale for the duration of this enrollment period. Following the expiration of this enrollment period, no new customers may enroll in the Program, but any contract established under this Program between BellSouth and its customers would continue to be available for resale for the remaining term of the existing contract. Aside from these resale situations, a customer may not assign its rights under any contract signed pursuant to this Program to another customer or to any other third party. (N)
6. Should a participating customer terminate a contract signed under this Program without cause, the customer must pay BellSouth a termination liability equal to the lesser of: (1) the total of the repayment of discounts received during the previous twelve (12) months of service and the repayment of the prorated amount of any waived or discounted nonrecurring charges; or (2) six percent (6%) of the total contract amount. The same termination provisions will apply for all underlying services. (N)
7. Customers with aggregated state-wide location revenues that exceed \$36,000 annually are not eligible to participate in the Business Discount Program, even if some or all of their locations meet the revenue criteria. (N)
8. Base and Hunting discounts (for grouping service) apply only to BST total billed revenue within Tennessee. (N)
9. Customers with volume and term Contract Service Arrangements (CSAs) are not eligible for this Program. (N)
10. Customers participating in previous Key Customer Promotions, Business Discount Programs, the Hunting Term Promotion, the Competitive Response Program and/or any future versions of those promotions are not eligible for this Program. (N)
11. A customer which is currently participating in the Hunting Term Promotion and which wishes to participate in this program may terminate its Hunting Term Promotion contract without incurring termination liability if the term elected by the customer under this program equals or exceeds the remaining term of the customer's Hunting Term Promotion contract. (N)

GENERAL SUBSCRIBER SERVICES TARIFF

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BELLSOUTH
TELECOMMUNICATIONS, INC.
TENNESSEE
ISSUED: May 25, 2001
BY: President - Tennessee
Nashville, Tennessee

EFFECTIVE: June 26, 2001

A13. MISCELLANEOUS SERVICE ARRANGEMENTS**A13.90 Business Programs (Cont'd)****A13.90.6 2001 Key Business Discount Program (cont'd)****B. Discount Schedule**

1. Base discounts applicable to the subscribers' total billed revenue at Tennessee locations in specific wire centers as defined in A.1.; 2.; 3.; and 4 preceding are as follows:

Monthly Total Billed Revenue	18 Month Term	36 Month Term
\$1,000 - \$3,000	14%	18%
\$150 - \$999.99	10%	14%
\$100 - 149.99	6%	10%
Hunting Discount	50%	75%

2. If a Program participant orders additional services during the enrollment period, line connection charges will be waived for those services ordered. In addition, from June 26 through September 28, 2001, customers who order additional lines and who choose a three year contract are eligible for a waiver of 12 months' recurring charges for BellSouth® Voice Mail service (BVM) (where BVM is available).
3. For each month during which a contract which is signed under this Program is in effect, the customer will receive the discount associated with the customer's total billed BellSouth revenue at a given Tennessee location as defined in A.1.; 2.; 3.; and 4 preceding for that particular month.
4. If a Program participant's total billed BellSouth revenue at a given Tennessee location as defined in A.1.; 2.; 3.; and 4 preceding in a given month falls below the minimum revenue per month or above the maximum revenue per month, discounts will not be applied at that location for that month.
5. The applied discounts will appear as a credit in the Other Charges and Credits (OC&C) section of the Program Participant's bill.

* BellSouth is a registered trademark of BellSouth Intellectual Property Corporation

ATTACHMENT 2



BellSouth Telecommunications, Inc.
333 Commerce Street, Suite 2101
Nashville, TN 37201-3300

guy.hicks@bellsouth.com

Guy M. Hicks
General Counsel

'02 FEB 1 PM 3 42

February 1, 2002

615 214 6301
Fax 615 214 7406

EXECUTIVE

VIA HAND DELIVERY

PROPRIETARY INFORMATION ENCLOSED

David Waddell, Executive Secretary
Tennessee Regulatory Authority
460 James Robertson Parkway
Nashville, TN 37238

Re: *Complaint of XO Tennessee, Inc. Against BellSouth Telecommunications, Inc.*

Complaint of Access Integrated Networks, Inc. Against BellSouth Telecommunications, Inc.

Docket No. 01-00868

Dear Mr. Waddell:

This is to provide a brief explanation of the proprietary documents submitted to the Authority on November 19, 2001. BellSouth intended to include this explanatory information in its November 19 cover letter transmitting the documents, but mistakenly omitted this information from that cover letter. BellSouth is also submitting a Revised Attachment 6.2 for the reasons set forth below.

First, Attachment 6.2 is a list of the 63 Tennessee customers who accepted the offer that is described in BellSouth's Response to Item 2. As explained in the pre-filed direct testimony of Richard Tice, this list includes 64 customers, but the customer with the telephone number beginning with the 502 area code has no BST services to which the offer applied in Tennessee. That customer was included on the list because the Select enrollment form erroneously lists the customer's address as Louisville,

420938

David Waddell, Executive Secretary
February 1, 2002
Page 2

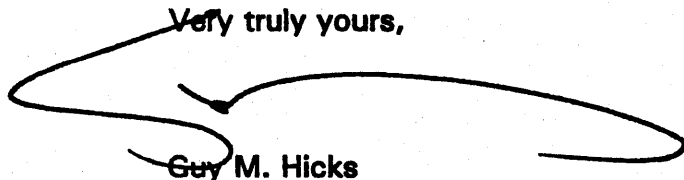
Tennessee instead of Louisville, Kentucky. Thus, only 63 Tennessee customers accepted the offering.

The asterisks placed beside the names of certain customers identify those customers who were receiving service from BellSouth when they accepted this offer. Recently, Bellsouth has determined that it inadvertently placed an asterisk beside one customer name. Enclosed is a revised Attachment 6.2 which does not include an asterisk beside that customer's name. This is the only revision made to Attachment 6.2

Revised Attachment 6.2 contains proprietary information and is being submitted to the Authority and served on the parties subject to the terms of the Protective Order entered in this proceeding.

Second, Attachment 6.1 is a list of Tennessee customers that have signed contracts pursuant to the 2001 Key Business Discount Program. Some of these customers have had some of the points that they have earned applied to their BellSouth bills in the form of credits, the dollar value of which is set forth in Attachment 6.2. Customers will be able to redeem their remaining points in the future (subject to the limitation on redemptions that are discussed in Mr. Tice's pre-filed direct testimony), but not as credits to their bills.

Very truly yours,

A handwritten signature in black ink, appearing to read "Guy M. Hicks", with a large, sweeping loop extending to the left and then back to the right.

Guy M. Hicks

GMH:ch
Enclosure

Company Name	Phone Number	Person	Amount
J and W Motor Company	4238675091	Jerry Ferguson	\$ 125.00
M & B Printing	9018546893	Mike Christman	\$ 150.00
Mildred's Insurance Agency	9013458837	Mildred Bovey	\$ 150.00
John Grenne Realtors	9018530763	Allen Grenne	\$ 1,825.00
A & W Garage	6158241818	Eddie Wink	\$ 125.00
Box It	4238938100	Julie Cowert	\$ 125.00
Barakat's Middle East Market	9013770707	Mark Barakat	\$ 125.00
Lil O Bit O Heaven	6157903790	Ellie Engberg	\$ 125.00
Edward Jones Investment	6157789482	Murry Willis	\$ 100.00
Door To Paradise	6153400098	Jesse Turner	\$ 125.00
NASTC	6154514555	Dana Campbell	\$ 725.00
Eye Center	6154517135	Jeff Hartline	\$ 375.00
Southeastern Tool & Die	6156434591	Linda Occzeck	\$ 800.00
Dalehite-Collins Insurance Service	9018540201	Dale Collins	\$ 300.00
W Michaels Davis & Associates	6153731224	Katie Means	\$ 275.00
What's In Store	6156625886	Ken Smagowicz	\$ 225.00
Power Screen & Rentals	5023269300	Chris Purcell	\$ 650.00
Carmichael's Nursery & Landscape	8658881473	Cheryl Carmichael	\$ 325.00
A-1 Machines	9017952519	Bill Barrett	\$ 225.00
Affordable Outdoor Products	8655227555	Steven Poarch	\$ 300.00
Joseph Coker, Atty	4235625187	Kemper Coker	\$ 450.00
College Heights Academy	6154524988	Linda Gilmore	\$ 325.00
College Heights Baptist Church	6154524952	Larry Summers	\$ 375.00
Restorative Health Services	6154437330	Aaron Sorenson	\$ 125.00
Gambler Motorcycle Co.	6158267777	Elvie Spurlock	\$ 175.00
North American Tours	6158221401	Elvie Spurlock	\$ 150.00
Ticket for Travel	6155911874	Ellie Engberg	\$ 100.00
Gilbert Stein, DDS	9017551177	Robin Frazier	\$ 225.00
Aaron Mortgage	9313887878	Mike Kuzawinski	\$ 150.00
Center of Attention	9017540073	Aaron Sorenson	\$ 175.00
International Parts Network Inc	6153910272	Mike Shrumn	None
Line X of Knoxville	8658544515	Tamera Faircloth	None
The Ham Company	9018536700	Gracey	None
Heritage Forge & Wrought Iron	7314230608	Paul Anderson	None
Pro Blind	9013820800	David Gassoway	None
McCall's Carpet One	6156461118	Kathy McCall	None
Val-U-Signs	8654829523	Judy Valentine	None
Sword of the Lord Foundation	6158936700	Jerry Rockwell	None
Harbs Carpeting & Oriental Rugs	8655255166	Libby Harb	None
Specialty Binding Services Inc	9013887156	David McLaughlin	None
Allied Business Group	9017672354	Michael Kearney	None
James Techn Service	8654509629	William James	None

PROPRIETARY

Not for use or disclosure outside of BellSouth except pursuant to a written agreement

C&P Refrigeration	6152563737	Michele Erzale	None
Sports Barn	4232661125	Don Sims	None
Appraisal Associates	9017558798	Jean Johnson	None
Galyon Lumber Company Inc	8655844542	Carole Galyon	None
Concord Baptist Assoc	6158908409	Tim Fisher	None
Prime Time Rental	4238679966	Mike Higdon	None
Ladies Paradise	4234990350	Teresa Ellis	None
Best Western of Dayton	4237756560	Derish Patel	None
Montgomery County Farmers Coop	9316480637	Karen McKay	None
Jim Brinkley Realtors	6156723980	Elaine Brinkley	None
A Mortgage Link	9013846002	Shirley Pruitt	None
Boyd Buchanan School	4236226177	N/A	None
East Tn Pioneer Oil	8655238163	Rick Cherry	None
I Giles	order pending	Frank Barnes	None
Reel Theatres	8654538600	N/A	None
Shops of Ann Adler	9016831700	Ann Adler	None
Spectrum Inc	8654259744	N/A	None
Spicer Flynn and Rudstra	9015231333	N/A	None
Trend Sales	9013682698	Roberta Poff	None
ZellWage Luster Inc	8655889716	Amy Gulin	None
Askew Hargraves Harcourt & Assoc	7316610139	Jeremy Scallion	None
Johnson and Scott	6152545454	Ed Hockey	None

PROPRIETARY

Not for use or disclosure outside of BellSouth except pursuant to a written agreement

ATTACHMENT 3

BEFORE THE TENNESSEE REGULATORY AUTHORITY

NASHVILLE, TENNESSEE

**IN RE: DOCKET TO ESTABLISH GENERIC PERFORMANCE
 MEASURES, BENCHMARKS AND ENFORCEMENT
 MECHANISMS FOR BELL SOUTH TELECOMMUNICATIONS,
 INC.
 DOCKET NO. 01-00193**

**TESTIMONY OF RODNEY PAGE OF
ACCESS INTEGRATED NETWORKS, INC.**

JULY 16, 2001

BEFORE THE TENNESSEE REGULATORY AUTHORITY
NASHVILLE, TENNESSEE

IN RE: *Docket to Establish Generic Performance Measurements, Benchmarks and Enforcement Mechanisms for BellSouth Telecommunications, Inc.*
Docket No. 01-00193

TESTIMONY OF RODNEY PAGE

1 Q. PLEASE STATE YOUR NAME AND BUSINESS ADDRESS FOR THE RECORD.

2 A. My name is Rodney Page. My business address is Access Integrated Networks, Suite
3 101, 4885 Riverside Drive, Macon, Georgia, 31210, Main number: 478-475-9800, FAX:
4 478-476-7997, E-mail: rodney.page@accesscomm.com

5

6 Q. WHAT IS ACCESS INTEGRATED NETWORKS?

7 A. Access Integrated Networks, Inc. (Access) is a provider of telecommunications service to
8 small business customers in the southeast. Founded in Macon, Georgia in 1996, the
9 company is certified in the 9 states in the BellSouth region. Access provides local service
10 via the UNE-P product as provided in its Interconnection Agreement with BellSouth.

11

12 Q. WHAT IS YOUR POSITION WITH ACCESS?

13 A. I am Vice President-Marketing and Strategic Development. A portion of my
14 responsibilities includes the development of the Regulatory function of the business with
15 the general objective of monitoring pertinent federal/state regulatory issues that impact
16 the company's ability to achieve its business plan. I have over 30 years of experience in
17 the telecommunications industry, including 21 years with BellSouth and 7 years as
18 president of my own consulting firm, all prior to joining Access in July 1999.

19

1 Q. WHAT IS ACCESS' INTEREST IN BELLSOUTH'S PROPOSED
2 PERFORMANCE MEASURES?

3 A. With approximately 57,000 lines currently in place (4,200 +/- in Tennessee) the company
4 has had extensive experience in other BellSouth states (primarily Georgia) in ordering
5 and provisioning the UNE-P product. As we expand in Tennessee, we are very interested
6 in ensuring that BellSouth's performance measures adequately reflect that company's
7 competence in supporting CLECs' operations, specifically, the UNE-P product. Access
8 has recently become active in the regulatory arena and supports the initiatives of other
9 CLECs to insure appropriate performance measures and remedies are developed and
10 enforced.

11
12 Q. ARE PERFORMANCE MEASURES IMPORTANT TO A NEW ENTRANT
13 STARTING IN THE TELECOMMUNICATIONS BUSINESS IN TENNESSEE
14 AND ELSEWHERE?

15 A. Yes. Any service provider, particularly a small startup, is dependent upon its
16 reputation in the marketplace. Prospective customers have natural reservations about
17 switching from the incumbent carrier, and our company's business relationship with
18 customers is particularly vulnerable at the time of conversion. Operational problems that
19 cause a disruption of customers' service at the time of conversion severely jeopardize the
20 customers' confidence in Access as well as that of our sales agents. In 2000 and 2001,
21 we experienced problems with BellSouth that notably impacted Access' ability to market
22 its products. The only way to avoid these types of problems is to have measures in place
23 to ensure that the incumbent is treating the CLEC fairly.

1 Q. WHAT TYPES OF OPERATIONAL DIFFICULTIES HAS ACCESS
2 EXPERIENCED WITH BELLSOUTH?

3 A. We have encountered problems with BellSouth in OSS responsiveness, and UNE-P
4 specific provisioning issues such as: Coordination of disconnect ("D") and new ("N")
5 Orders, Reassignment or Loss of Facilities, Loss of Customer's features, and Problem
6 Resolution.

7
8 Q. WHAT DO YOU MEAN WHEN YOU SAY THAT YOU HAVE HAD TROUBLE
9 WITH OSS RESPONSIVENESS?

10 A. Access places orders to BellSouth via LENS, the electronic preorder and order interface
11 developed by BellSouth and Robotag, a BellSouth proprietary TAG front-end interface.
12 These interfaces utilize TAG, BellSouth's electronic gateway for all electronic order
13 processing. The TAG interface must be working in order for LENS/Robotag to function.
14 CLECs like Access are completely reliant on BellSouth and these systems because, as a
15 UNE-P provider, all the components of the end-users' service are provided by BellSouth.
16 However, there have been numerous BellSouth system problems related to TAG.
17 Several due dates for the 'fixes' to TAG have been promised, the latest implemented in
18 November, 2000. However, we continue to experience reliability problems with TAG,
19 including some after the November 'fix'. Specifically, we experienced TAG-related
20 outages on the following days:

- 21 • November 1, 2000
- 22 • November 6, 2000
- 23 • November 9, 2000
- 24 • November 14, 2000
- 25 • November 15, 2000

- 1 • *Week of November 18, 2000*
- 2 • *December 18, 2000*
- 3 • *December 20, 2000*
- 4 • *December 21, 2000*
- 5 • *January 15, 2001*
- 6 • *January 16, 2001*
- 7 • *January 17, 2001*
- 8 • *January 24, 2001*
- 9 • *January 29, 2001*
- 10 • *February 2, 2001*
- 11 • *February 8, 2001*
- 12 • *February 9, 2001*
- 13 • *February 13, 2001*
- 14 • *February 14, 2001*
- 15 • *February 15, 2001*
- 16 • *February 19, 2001*
- 17 • *February 23, 2001*
- 18 • *February 26, 2001*
- 19 • *March 1, 2001*
- 20 • *March 2, 2001*
- 21 • *March 8, 2001*
- 22 • *March 13, 2001*
- 23 • *March 19, 2001*
- 24 • *March 20, 2001*
- 25 • *March 22, 2001*
- 26 • *March 26, 2001*
- 27 • *March 27, 2001*
- 28 • *March 28, 2001*
- 29 • *March 29, 2001*
- 30 • *April 2, 2001*
- 31 • *April 3, 2001*
- 32 • *April 5, 2001*
- 33 • *April 6, 2001*
- 34 • *April 9, 2001*
- 35 • *April 13, 2001*
- 36 • *April 14, 2001*
- 37 • *April 18, 2001*
- 38 • *April 24, 2001*
- 39 • *April 25, 2001*
- 40 • *April 26, 2001*
- 41 • *May 1, 2001*
- 42 • *May 7, 2001*
- 43 • *May 9, 2001*
- 44 • *May 21, 2001*
- 45 • *May 24, 2001*

- 1 • *May 25, 2001*
- 2 • *June 5, 2001*
- 3 • *June 6, 2001*
- 4 • *June 8, 2001*
- 5 • *June 11, 2001*
- 6 • *June 12, 2001*
- 7 • *June 13, 2001*
- 8 • *June 14, 2001*
- 9 • *June 18, 2001*
- 10 • *June 19, 2001*
- 11 • *June 20, 2001*
- 12 • *June 21, 2001*
- 13 • *July 2, 2001*
- 14 • *July 3, 2001*
- 15 • *July 5, 2001*
- 16

17 The duration of these outages varies widely, but all have been extremely disruptive and inhibited
18 the company from both converting new customers and supporting existing customers. As a
19 UNE-P provider, Access is completely dependent on the reliability of BellSouth systems.
20 Outages, such as those described above, completely debilitate the company. Much of the
21 conversion order entry as well as add/move/change activity of its installed base comes to a
22 complete halt. These types of problems in the BellSouth system cause backlogs in our service,
23 and impair our ability to provide the exceptional customer satisfaction that is the hallmark of our
24 company. These problems impact Access' ability to provide service in all of its markets.

25

26 **Q. PLEASE TELL THE AUTHORITY ABOUT THE UNE-P SPECIFIC**
27 **PROVISIONING ISSUES ACCESS HAS EXPERIENCED WITH BELL SOUTH.**

1 A. The process of converting an end-user customer from BellSouth retail to UNE-P is very
2 complex. Unlike 'resale' where little changes on the customer's account other than
3 moving it from BellSouth's retail billing system to its wholesale equivalent, the UNE-P
4 conversion process literally consists of 2 separate work orders:

5 - "D" (disconnect) order: disconnects the customer's BellSouth retail account.

6
7 - "N" (New) order: reestablishes the account as UNE-P, billed to Access.
8

9
10 According to BellSouth, this is required due to the fact that the customer's BellSouth
11 retail account is usually 'flat rate' and the UNE-P product is 'usage based.' However, the
12 process is wrought with opportunities for severe failures.

13

14 Q. WHAT TYPES OF FAILURES HAVE YOU EXPERIENCED WITH
15 BELLSOUTH?

16 A. A common problem is that the "D" and "N" Orders are not worked at the same time.
17 BellSouth's systems are supposed to 'relate' the separate orders. However, at times this
18 does not occur. The "D" is worked and the "N" isn't. As a result, the customer's service
19 is disconnected completely. When this occurs, the customer assumes the disconnect was
20 Access' fault.

21

22 Q. ARE THESE THE ONLY D&N PROBLEMS THAT YOU HAVE EXPERIENCED
23 WITH BELLSOUTH?

24 A. No. Another problem we encounter is a loss of the customer's features. Unless Access
25 requests otherwise, the D&N process is supposed to convert the customer 'as is'. That is

1 to say that the customer is supposed to retain all the allowable features and services that
2 he or she had with BellSouth. Features such as hunting, call waiting, caller ID, etc. are
3 supposed to be retained automatically through the conversion process. In some cases
4 they aren't. Access suffered severely during the summer of 2000 when hundreds of our
5 customers lost their hunting feature upon conversion. The hunting feature provides the
6 ability for a customer to have one main listed number with additional lines 'in hunting'
7 behind the main number. Callers dial the main number and the hunting feature searches
8 for any available line in the 'hunt group' and processes the incoming call to any of the
9 customer's available lines. When the hunting feature is not programmed properly, it, in
10 effect, reduces the number of lines the customer can receive incoming calls to one, the
11 main number. For a small business customer, loss of this feature is almost as devastating
12 as losing service entirely. It must be understood that provisioning the UNE-P product is a
13 unique process, and performance measures must be developed to insure that BellSouth
14 recognizes that uniqueness and is held accountable for supporting the product effectively.

15
16 **Q. WHAT DO YOU MEAN WHEN YOU SAY THAT YOU HAVE HAD TROUBLE**
17 **WITH "PROBLEM RESOLUTION?"**

18 **A.** The provisioning problems described above are very complex and cannot be resolved
19 without intervention and assistance from BellSouth. They fall into 'purgatory' between
20 a service order problem and a maintenance problem. Though progress has been made,
21 24-hour access to trained, skilled BellSouth personnel must be improved. Therefore,
22 *Service Center* access measurements must reflect the criticality of the nature of UNE-P
23 calls. Since customer outages caused by the provisioning problems explained above must
24 usually be solved by the Service Center (not the Maintenance Center), access to it must
25 be the same as for the Maintenance Center.

1 BellSouth established a new centralized Service Center in Fleming Island, Florida in late
2 2000. Access was not informed beforehand of the change in Service Centers from
3 Birmingham to Fleming Island. This initially caused significant confusion and a drop in
4 service quality provided. Access and BellSouth have established a useful dialog to
5 resolve problems, however, Access remains concerned about: 1) the lack of experience
6 of the BellSouth employees; 2) ongoing amount of incorrectly processed orders; 3) ability
7 to resolve problems in a timely fashion.
8

9 **Q. WHAT SORT OF EFFECT DO THESE TYPES OF PROBLEMS HAVE AS NEW**
10 **ENTRANTS, LIKE ACCESS, TRY TO DEPLOY SERVICES TO TENNESSEE**
11 **CUSTOMERS?**

12 **A.** For a carrier entering a new market, its potential customers must have confidence in the
13 reliability of the new carrier they are considering. For small businesses, few of its
14 operational elements are more important than telecommunications. Often, a prospective
15 small business customer's decision to change carriers is dependent on his perception of a
16 competing carrier's ability to provide reliable service. In Tennessee, Access will provide
17 a local service alternative to a market (small businesses) that has historically had few
18 options available to it. BellSouth operational problems can severely inhibit our ability to
19 provide that alternative.

20
21 **Q. DOES THIS CONCLUDE YOUR TESTIMONY AT THIS TIME?**
22

23 **A.** Yes it does.
24

ATTACHMENT 4

0139

1 BEFORE THE TENNESSEE REGULATORY AUTHORITY

2

3 IN RE:)
4 DOCKET TO ESTABLISH GENERIC)
PERFORMANCE MEASUREMENTS,) Docket No.
5 BENCHMARKS, AND ENFORCEMENT) 01-00193
MECHANISMS FOR BELL SOUTH)
6 TELECOMMUNICATIONS, INC.)

7

8

9 -----

10 TRANSCRIPT OF PROCEEDINGS

11 Wednesday, August 22, 2001

12 VOLUME III C

13 -----

14 APPEARANCES:

15 For Access Integrated Networks, ATM-Discount Mr. Henry Walker
16 Communications, Birch Telecom, COVAD
17 Communications, US LEC, XO, ICG, and MCI WorldCom:
18
19 For Time Warner Telecom of the Mid South, L.P.: Mr. Charles B. Welch, Jr.
20 For AT&T: Mr. William Prescott
21 For BellSouth Telecommunications: Mr. Guy M. Hicks
22 Mr. Mr. Douglas Lackey
23 For TRA Staff: Dr. Chris Klein
Mr. David Foster

24 Reported By:

25 Carol A. Nichols, RDR, CRR, CCR

0162

- 1 A. That's my issue.
- 2 Q. So it's an operational issue with the
- 3 application of the measure?
- 4 A. Absolutely.
- 5 Q. Let's talk about the provisioning issues.
- 6 You talk about D & N -- the letter N -- orders, correct?
- 7 D and the letter N orders, disconnect and new, I think
- 8 is probably what --
- 9 A. Yes, sir.
- 10 Q. What happens, if I understand your
- 11 testimony, is when you take a retail customer from
- 12 BellSouth, there's a disconnect order -- the customer is
- 13 disconnected -- and there's a new connect order. The
- 14 customer is transferred to you, correct?
- 15 A. Hopefully simultaneously and seamlessly,
- 16 yes, sir.
- 17 Q. The orders are supposed to be related to
- 18 each other, and they're supposed to be worked at the
- 19 same time?
- 20 A. Yes, sir.
- 21 Q. Now you have 5,000 customers in Tennessee?
- 22 A. 5,000 lines.
- 23 Q. 5,000 lines; that's right.
- 24 A. Yes, sir.
- 25 Q. How many customers do you have?

ATTACHMENT 5

0139

1 BEFORE THE TENNESSEE REGULATORY AUTHORITY

2

3 IN RE:)
4 DOCKET TO ESTABLISH GENERIC)
PERFORMANCE MEASUREMENTS,) Docket No.
5 BENCHMARKS, AND ENFORCEMENT) 01-00193
MECHANISMS FOR BELL SOUTH)
6 TELECOMMUNICATIONS, INC.)

7

8

9 -----

10 TRANSCRIPT OF PROCEEDINGS

11 Wednesday, August 22, 2001

12 VOLUME III C

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of the Mid South, L.P.:
20 For AT&T: Mr. William Prescott
21 For BellSouth Mr. Guy M. Hicks
Telecommunications: Mr. Mr. Douglas Lackey
22
23 For TRA Staff: Dr. Chris Klein
Mr. David Foster

24 Reported By:

25 Carol A. Nichols, RDR, CRR, CCR

0154

1 the Florida proceeding, weren't you?

2 A. In the workshop.

3 Q. Yes, sir.

4 A. I was.

5 Q. And you don't dispute, do you, that a
6 structural separation would add some level of cost to
7 the operation of a telephone company?

8 A. No, sir. I would not object to the fact
9 that it would add some level of cost.

10 Q. Okay, and when you increase the cost,
11 somebody has got to pay the cost, right?

12 A. Sure.

13 Q. And you-all are competing for those business
14 customers who are making contributions now to subsidize
15 other rates, right?

16 A. We're competing for business customers.

17 Q. And so when we break that company up, we're
18 not -- BellSouth is not going to be able to raise those
19 business rates, are we?

20 A. It depends on how much value you can create
21 in the marketplace.

22 Q. Well, if you're competing for the retail
23 business customers with us, we surely can't raise the
24 retail rates of the business customers to recover these
25 costs of the breakup, can we?

0155

1 A. Well, I would say that our desire over time
2 is to raise our rates, frankly, because we hope there's
3 more perceived value in doing business with us, and I
4 would presume BellSouth or any other company would want
5 to do that. Whether one could or not, I don't know.

6 Q. But let me see if I can get something we can
7 agree on. If we do a structural separation, the end
8 user's rates -- somebody's rates are going to have to go
9 up to cover the cost of that, isn't it?

10 A. We're not bringing any cost offsets or any
11 marketplace pressures that I think would drive -- would
12 certainly have an effect to drive costs down. If costs
13 go up, we both may eat margin, so I don't think it's
14 necessarily absolutely correct to assume that this would
15 drive, in the long term, prices up. Costs may go up,
16 but I'm not sure that's necessarily connected with
17 price.

18 Q. Well, if costs went up, aren't the UNE rates
19 that you pay, the services you buy from us -- at least
20 theoretically -- based on cost?

21 A. Theoretically.

22 Q. Okay. So if costs went up, those would go
23 up, wouldn't it?

24 A. Yeah.

25 Q. You wouldn't want to represent to the

ATTACHMENT 6

**BEFORE THE TENNESSEE REGULATORY AUTHORITY
NASHVILLE, TENNESSEE**

In re: *BellSouth Telecommunications, Inc. Tariff to Introduce 2001 Key Business Discount Program*

Docket No. 01-00461

PETITION OF THE SOUTHEASTERN COMPETITIVE CARRIERS ASSOCIATION

The Southeastern Competitive Carriers Association ("SECCA") petitions the Tennessee Regulatory Authority ("TRA" or "Authority") to suspend the effective date of the above-captioned promotional tariff filed by BellSouth Telecommunications, Inc. ("BellSouth") on May 31, 2001. The scheduled effective date is June 26, 2001.

Members of SECCA provide competitive local exchange services in Tennessee and the rights and interests of SECCA members will be substantially affected by decisions made by the TRA in this proceeding.

The tariff purports to be a thirty-day "promotional" tariff but, in fact, locks customers into contracts of eighteen-to-thirty-six months. This is not a promotional tariff since the effect of the tariff extends well beyond the ninety-day promotional period. Furthermore, the tariff offers discounts in some wire centers but not in others. There is no explanation in the tariff for this presumptively unreasonable discrimination.

Finally, it is SECCAs belief that similar tariffs have been withdrawn in Georgia, suspended in Alabama and are under investigation in Florida because of regulatory concerns.

Therefore, SECCA respectfully requests that:

- (1) the matters be set for hearing or other appropriate proceeding for purposes of receiving industry input;
- (2) the tariff and promotions be suspended pending further investigation; and
- (3) such other, further, general, specific and more equitable relief as may be just and proper under the circumstances.

Respectfully submitted,

Henry Walker *by WLM*
Henry Walker *permission*
Henry Walker
Boult, Cummings, Conners & Berry PLC
414 Union St., Suite 1600
Nashville, TN 37219
Counsel for SECCA

CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the foregoing has been forwarded via U.S. Mail, postage prepaid, to the following on this the ^{19th}~~14th~~ day of June, 2001.

Guy Hicks, Esq.
BellSouth Telecommunications, Inc.
333 Commerce St.
Suite 2101
Nashville, TN 37201-3300

Timothy Phillips, Esq.
Office of the Consumer Advocate and Protection Division
Attorney General's Office
P.O. Box 20207
Nashville, TN 37202

Henry Walker by WLM
Henry Walker, Esq.

ATTACHMENT 7

**BEFORE THE TENNESSEE REGULATORY AUTHORITY
NASHVILLE, TENNESSEE**

IN RE: NOTICE OF RULE-MAKING-RULE
1220-4-2.-59 ("Special Contracts")
REGULATIONS FOR THE PROVISIONING
OF TARIFF TERM PLANS AND SPECIAL
CONTRACTS.

DOCKET NO. 00-00702

**COMMENTS OF THE ATTORNEY GENERAL AND
REPORTER, PAUL G. SUMMERS, THROUGH THE
CONSUMER ADVOCATE AND PROTECTION DIVISION**

Paul G. Summers, Attorney General and Reporter, through the Consumer Advocate and Protection Division of the Office of the Attorney General and Reporter for the State of Tennessee ("Attorney General"), respectfully submits the following comments in response to the Tennessee Regulatory Authority's Notice of Rulemaking — Rule 1220-4-2.-59 ("Special Contracts") Regulations for the Provisioning of Tariff Term Plans and Special Contracts (hereinafter "Special Contracts Rules"). The comments are submitted in the Attorney General's public interest role of protecting consumers through his enforcement and investigatory power under the Consumer Advocate and Protection Division's activities before the Tennessee Regulatory Authority ("Authority").

POSTED
11-14-20

OVERVIEW

By way of overview, the Attorney General contends that special contracts with high charges for ending or terminating a multi-year contract for telecommunications services have a strong anti-competitive impact on customers because it inhibits the customers' ability to make buying choices based on price and service. As a result, the Attorney General advocates that any such termination or ending fees be as small as possible to foster and encourage competition in the State of Tennessee. Further, the Attorney General specifically requests that termination charges be small to permit consumers to take advantage of the better service and savings that competition brings about over time.

The Attorney General supports the efforts of the Tennessee Regulatory Authority ("Authority") to introduce competition into this market. While the policy decisions of the Authority necessarily require it to make choices as to timing and degree of changes, the new rule is certainly a good step in the correct direction toward allowing the businesses involved to compete equally for the privilege to provide a good service at a good price to the target customers.

While the focus of the rule is the termination penalties involved, the Attorney General encourages the Authority to adopt the filing requirements of the proposed rule as well. The filing requirements are vital to assisting the Authority and its staff in limiting the possible circumvention of the substance of the rule and the policy it seeks to encourage. Further, the Attorney General encourages the Authority to apply the new rule retroactively, thus fostering a climate of competition now rather than 4 or 5 years from now.

GENERAL DISCUSSION

The Attorney General prefers that any termination charges be reasonably related to the telecommunications company's actual cost associated with terminating the contract. Under the present environment, these termination charges are penal in nature and bear little relation to the telecommunications actual cost. Termination charges in a tariff plan or special contract are derived from the difference between services priced at a tariff rate and the services priced at a discount rate over the entire duration of the contract. For example, services priced according to the tariff may create revenue of \$500,000 for the telecommunications carrier but it may offer a discount to the customer where revenues are \$400,000. If the customer enters the contract but wishes to terminate it halfway through after having provided only \$200,000 to the carrier, then the termination charges would be \$300,000. Said another way, the lower the discount revenues, the higher the customer's termination charges.

This gives the provider a powerful economic incentive to drive down its discounted price to the minimum sustainable under Tenn. Code Ann. § 65-5-208(c), which provides that a company must adhere to a price floor. There is little risk for the provider, who stands to be "made whole" by termination charges since their foundation is laid on the gross (tariff) revenues of \$500,000 rather than the net(discount) revenues of 400,000. This process subverts a customer's normal economic behavior when comparing alternative providers of a given service because the comparison includes not just the price of the service and its quality, but also disproportionately large termination charges.

Furthermore, since the telecommunications providers are operating under price-cap regulation, the tariffs do not require cost justification. Thus the companies have the freedom to

set the tariffs at any price level they choose, provided the company complies with an overall revenue constraint. Therefore, tariffs may be well above that required of a company to offer the service. That providers offer a discount begs the question why the tariff is set as high as it is in the first place, suggesting that tariff levels may be set with an intent to create high termination charges which hinder customer choice.

The customer's cost of switching to another provider, who may well have superior technology, is driven up, delaying the day when more efficient technology penetrates the market. Termination charges truly have an anti-competitive effect and work against the Tennessee General Assembly's declaration of a telecommunications service policy whereby "the policy of this state is to foster the development of an efficient, technologically advanced statewide system of telecommunications services..." Tenn. Code Ann. § 65-4-123. Customers change carriers not only to receive lower rates but to obtain more advanced services as well. Excessive termination charges, therefore, impede the spread of more technologically advanced services.

The proposed rule is certainly a good step toward providing a solution to this problem. The Attorney General strongly supports the Authority's efforts.

Any suggestions that the filing requirements would be burdensome appear belied by BellSouth's experiences, as described at the October 18, 2000 hearing.

The lone change the Attorney General asks the Authority to consider is making the new rule apply retroactively rather than prospectively. Open competition in this area is well overdue. A "special contract" supposedly represents the free choices of buyers and sellers and assumes the premise that neither party induces the other to accept terms harmful to their respective self

interest. But it has long been recognized that individually beneficial decisions can have harmful cumulative effects.

The links between individual decisions and their overall effect was examined in "The Tyranny of Small Decisions," an essay written in 1966 by Alfred E. Kahn, who wrote:

A market economy makes its major allocations decisions on the basis of a host of 'smaller decisions . . . [But] the consumer can be victimized by the narrowness of the context in which he exercises his sovereignty . . . [I]f enough people vote for X, each time necessarily on the assumption that Y will continue, Y may, in fact, disappear . . . , a genuine deprivation that customers might willingly have paid something to avoid.

In the context of rulemaking, Y is the new competitor with the more efficient technology who seeks to compete with X on terms of price and quality instead of termination fees. But if termination fees constantly tilt individual decisions to X, Y will never reach consumers, the more efficient technology will not be used and the entire economy is worse off. The Attorney General urges the TRA to take the long, broad view recognizing that individual decisions are being unduly influenced by termination fees and that such influence must be greatly reduced for competitive telecommunications markets to flourish in Tennessee.

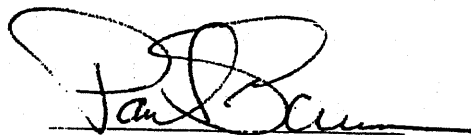
The Attorney General concurs with comments of counsel for NEXTLINK, made at the hearing of October 18, 2000 that special contracts are tariffs and subject to change at the Authority's order, just like any other tariff is subject to the Authority. These remarks provide a real life example of the constraints on trade presently prevalent. Therefore, the new rules should be applied to all tariff plans and special contracts, not just those entered into after the rules are adopted.

The Attorney General supports the Authority's interest in leveling the playing field in this market. The proposed rules, if applied to all parties and all contracts, are a significant step toward balancing the interests of business and consumer.

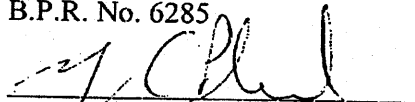
CONCLUSION

Consistent with its comments, the Attorney General recommends the new rule to the Authority. If the Authority needs any additional information or clarification of these Comments, please contact Timothy C. Phillips, Assistant Attorney General.

RESPECTFULLY SUBMITTED,



PAUL G. SUMMERS
Attorney General & Reporter
B.P.R. No. 6285



TIMOTHY C. PHILLIPS
Assistant Attorney General
B.P.R. No. 12751
Consumer Advocate and Protection Division
425 Fifth Avenue North
Nashville, Tennessee 37243
(615) 741-3533

CERTIFICATE OF SERVICE

I hereby certify that on February 19, 2002, a copy of the foregoing document was served on the parties of record, via the method indicated:

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☐ Facsimile
☐ Overnight
☐ Electronic

Henry Walker, Esquire
Boult, Cummings, et al.
P. O. Box 198062
Nashville, TN 37219-8062
hwalker@boultcummings.com

☐ Hand
☒ Mail
☐ Facsimile
☐ Overnight
☐ Electronic

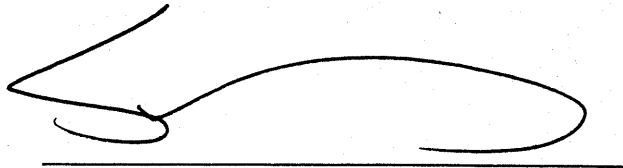
Chris Allen, Esquire
Office of Tennessee Attorney General
P. O. Box 20207
Nashville, Tennessee 37202
chris.c.allen@state.tn.us

☐ Hand
☒ Mail
☐ Facsimile
☐ Overnight
☐ Electronic

Nanette S. Edwards, Esquire
ITC^DeltaCom
4092 South Memorial Parkway
Huntsville, AL 35802
nedwards@itcdeltacom.com

☐ Hand
☒ Mail
☐ Facsimile
☐ Overnight
☐ Electronic

Bob Bye, Esquire
Cinergy Communications Company
8829 Bond Street
Overland Park, KS 66214
bye@cinergy.com



CERTIFICATE OF SERVICE

I hereby certify that on May 29, 2002, a copy of the foregoing document was served on the parties of record, via the method indicated:

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☐ Overnight
☐ Electronic

Henry Walker, Esquire
Boult, Cummings, et al.
P. O. Box 198062
Nashville, TN 37219-8062
hwalker@boultcumplings.com

- ☐ Hand
☒ Mail
☐ Facsimile
☐ Overnight
☐ Electronic

Chris Allen, Esquire
Office of Tennessee Attorney General
P. O. Box 20207
Nashville, Tennessee 37202
chris.c.allen@state.tn.us

- ☐ Hand
☒ Mail
☐ Facsimile
☐ Overnight
☐ Electronic

Nanette S. Edwards, Esquire
ITC^DeltaCom
4092 South Memorial Parkway
Huntsville, AL 35802
nedwards@itcdeltacom.com

- ☐ Hand
☒ Mail
☐ Facsimile
☐ Overnight
☐ Electronic

Bob Bye, Esquire
Cinergy Communications Company
8829 Bond Street
Overland Park, KS 66214
bye@cinergy.com

